42-79

RECORD, CASE Nos. 13,932 & 13,943.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 632.

THE CITY OF NEW ORLEANS ET AL., PLAINTIFFS IN ERROR,

vs.

THE NEW ORLEANS WATER WORKS COMPANY ET AL.

FILED DECEMBER 20, 1889.

TERM No., 639.

EDWARD CONERY, JR., ET AL., PLANTIFFS IN ERROR,

vs.

THE NEW ORLEANS WATER WORKS COMPANY ET AL.

FILED JANUARY 8, 1890.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1525.

THE CITY OF NEW ORLEANS AND JOSEPH A. SHAKESPEARE, MAYOR OF SAID CITY, PLAINTIFFS IN ERROR,

vs.

THE NEW ORLEANS WATER WORKS COMPANY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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1 STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

EDWARD CONERY, Jr., *et als.*
vs.
NEW ORLEANS WATER WORKS CO. and CITY OF NEW ORLEANS. } No. 15774.

Petition. Filed November 2nd, 1885.

To the honorable the judges of the civil district court in and for the parish of Orleans:

The petition of Edward Conery, Jr., James B. Sinnott,
2 Philip Hirsch, Geo. E. Sears, Frederick J. Odendahl, William Dillon, William H. Renaud, Booth F. Glover, John B. Camors, Alfred T. Baker, Joseph Simon, Nicholas Burke, Henry T. Cottam, Philip Thompson, Andrew Hero, Jr., Alfred Moulton, Louis Bush, James A. Chalaron, George H. Dunbar, E. I. Kursheedt, John W. Labouisse, Henry Lochte, I. L. Lyons, Ambrose A. Maginnis, Edward Miltenberger, Charles J. Meyer, Thomas N. McEnery, John Phelps, Joseph Schwartz, John Simpson, Edward Thompson, Samuel A. Trufant, Gideon Townshend, Anthony Vizard, Nathaniel D. Wallace, George Q. Whitney, Pearl Wight, Alfred A. Woods, Octave F. Valette, Newton Buckner, David A. Calder, and James G. Clark, Michael A. Rogers, all residents and citizens of the State of Louisiana and city of New Orleans, with respect showeth—

That your petitioners are all resident tax-payers of this city and that they pay into the city treasury annually for city purposes taxes exceeding in the aggregate ten thousand dollars.

That the Legislature of the State of Louisiana did, at its extra session in the year 1877, by act 33, approved on the 31st day of March, 1877, incorporate a company styled "The New Orleans Water Works Company," the object of which act is declared to be to enable the city of New Orleans to promote the public health and to afford greater security against fire by the establishment of the said corporation, to authorize the said company to issue bonds for the purpose of extending and improving the said work, and to
3 furnish the inhabitants of New Orleans an adequate supply of pure and wholesome water; that said act provided for the incorporation of a company with a capital stock of two millions of dollars and granted to it the exclusive privilege of furnishing water to the city of New Orleans and its inhabitants, from the Mississippi river or any other stream or river, by means of pipes and conduits, for fifty years from the date of the passage of the act; that, among other things, the 11th section of said act provided "that the city of New Orleans shall be allowed to use water from the pipes and plugs of said company, now laid or hereafter to be laid, free of charge, for the extinguishment of fires, cleansing of the streets, and for the use of

all the public buildings, markets, and charitable institutions, and that said company shall place, free of any charge whatever, two hydrants of the most approved construction in front of each square, where a main pipe shall be laid, at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets and cleansing the gutters, and for any other public purposes; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets at an equal distance from each *other* corner, and it shall be the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter, and in consideration thereof the franchises and property of the said New Orleans Water Works Company used in accordance with the act shall be exempt from taxation—State, municipal, and parochial."

That by act 43 of the acts of the year 1878 the said act of incorporation was amended in certain respects, and particularly the word "State," in section 11 of said act, in the last line thereof, was stricken out, so that said company was made liable to State taxes; that said act was accepted by the city of New Orleans, by the holders of water-works bonds, and by the holders of city indebtedness, and the said corporation was duly organized, and all the property purchased by the city of New Orleans from the Commercial Bank was transferred and delivered to said corporation, and said corporation entered upon the performance of its functions and complied with the terms and provisions of said acts of 1877 and 1878.

Your petitioners aver that at the time that the said act of incorporation of the water-works company was drawn, and that at the time said amendatory act was passed permitting the organization of said company, it was notoriously known by every intelligent person in the State of Louisiana and by all persons who participated in the organization of the said company that the Legislature had no power to exempt property from taxation of any kind or nature, except that which was actually used for church, school, or charitable purposes, and that the framers of the act and the acceptors of the said act at the time that the same was passed well knew that the said exemption from taxation was null, void, and of no force or effect; that for several years the water-works company supplied the city of New Orleans with water, and the city of New Orleans demanded of her no taxes.

That in the year 1881 the city of New Orleans brought suit against the water-works company for the sum of $11,484.87, the amount of the taxes assessed against the defendants' property for that year; that in said suit the water-works company reconvened and demanded payment for the water which it had furnished, and claimed a large sum of money as the price and value of the water furnished during the year 1881; that in the civil district court, where this case was tried, a judgment was rendered in favor of the city of New Orleans for the amount of the taxes for the year 1881, and a judgment was rendered on the reconventional demand in favor of the

water-works company and against the city for the value of the water supply of that year for the sum of $40,281.87; that from this judgment the city of New Orleans took an appeal, and that in the supreme court the judgment in favor of the city of New Orleans for the taxes of 1881 was affirmed and the judgment in favor of the water-works company against the city for the value of the water supply of 1881 was reduced to $11,484.87, the exact amount of the taxes for that year; that the supreme court of the State, in deciding the said cause, interpreted the legislative contract made between the city of New Orleans and the water-works company by virtue of said act 33 of 1877,

6 and declared that the water-works company, under and by virtue of the said contract, had no power to demand or claim or recover from the city of New Orleans, in any year, any sum for the water supply, which it was bound under its charter to furnish to the city, greater than the amount of the city taxes for that year, all of which will more fully appear by reference to the case styled City of New Orleans *vs.* The New Orleans Water Works Company, No. 9007 of the supreme court of the State of Louisiana, and by the printed and published opinion of the said court, as set forth on pages 432–'3–'4–'5 and 6th of the 36th volume of the Louisiana Annual Reports; that after the said judgment was rendered the water-works company, striving and contriving to obtain some unjust and unlawful advantage over the city of New Orleans, and not satisfied with the terms and conditions of the charter, which were the law of its life, as determined by the supreme court of the State, procured the Legislature, at its session of 1884, to pass an act known as act 56 of 1884, which is entitled "An act to provide for the supply of water to the City of New Orleans by the New Orleans Water Works Company in cases of the municipal taxation of said company; to authorize provision to be made for the payment of water supplied and to be supplied; to provide for obtaining a supply of clear or filtered water by the New Orleans Water Works Company, and to enable the city of New Orleans to contract for the same; to regulate the payment

7 of taxes imposed on said company contrary to the exemption given in its charter, and to put into effect section 11 of act No. 33 of acts of 1877, extra session, in instances of refusing or contrary to the exemption therein."

That the first section of said act declares "that in all instances of the taxation of the franchises or property of the New Orleans Water Works Company for any year or years by or for the city of New Orleans, or for municipal purposes, whether such taxation be for past or future years and the said company be in any manner obliged to pay, notwithstanding the exemption granted in section 11 of act No. 33 of acts of 1877, extra session, then in all such instances the said city of New Orleans is hereby empowered and required to pay the said company the value of all the water the said company has supplied or shall supply during any year or years for which said taxes have been or shall be levied to or for the use and purposes of the city of New Orleans, its public buildings, markets, or for streets, gutters, extinguishment of fires, or other public purposes."

That the second section of said act provides "that in all instances of such taxation contrary to said exemption or any future year or years the city of New Orleans shall provide in its budget or shall set aside and appropriate a sum sufficient to pay for the said water supply for said year or years: and unless this be observed and done the said company shall not be compelled to deliver water for the uses and purposes aforesaid."

8 That the third section of said act provides "that any taxes already imposed for any year contrary to said exceptions shall not be exacted nor any penalty or interest accrued be demanded thereon or any begin to run until said city shall have provided for the payment of the water supplied in said year or provision made therefor by remedy at law or equity."

That the fourth section of said act provides "that, to secure the inhabitants of New Orleans and to the use of the city a supply of filtered or clear water, the city of New Orleans be, and is hereby, empowered to contract with the said company and determine upon terms and conditions and fix a price for obtaining from said company such supply of clear or filtered water."

That the fifth section of said act provides "that nothing in this act shall be construed as in any manner abridging or otherwise affecting any of the rights, franchises, and privileges heretofore granted to said company, but all such rights, franchises, and privileges shall continue and belong to said company."

That the sixth section of said act provides "that all laws or parts of laws inconsistent herewith be, and are hereby, repealed, and this act shall have effect from and after its promulgation."

And your petitioners aver that, pretending to act under and by virtue of this statute, the city council of the city of New Orleans did, on the 23rd day of September, 1884, pass a certain ordinance numbered 909, council series, a copy of which is con-

9 tained in the contract, hereinafter mentioned, marked "B," wherein and whereby they authorized the mayor of the city of New Orleans to enter into a contract with the New Orleans Water Works Company on the terms and conditions therein set forth; that on the 3rd day of October, 1884, said J. V. Guillotte, mayor, and the said water-works company entered into a pretended contract before Joseph Dewey Taylor, notary, in alleged compliance with said ordinance No. 909, a certified copy of which is hereto annexed and made part of this petition and marked Document "B;" that, as appears by the said contract, the said mayor and council undertook and pretended to bind the city of New Orleans during the whole of the remainder of the charter of the New Orleans Water Works Co., a period exceeding forty years, to pay the said water-works company the sum of sixty ($60) dollars for each and every fire-plug, fire-hydrant, and fire-well connected with the mains or pipes of said company, of which there are now 1,139, and which number shall ever be the least measure of the annual sum to be paid said company; to pay said company annually $60 for each and every additional hydrant, fire-well, or fire-plug exceeding said number of 1,139 and hereafter attached to said mains and pipes; to inform said

company in writing of all decrease or increase required of said plugs, hydrants, or wells; to make promptly, fully, and specially annual appropriations in the budgets of the sum necessary to pay the amount stipulated under this contract in monthly payments, and to hold, set apart, and keep as a distinct fund the moneys or collections, as required by the said ordinance, and providing and setting forth many other details which are not of particular importance to be mentioned in this petition, but which will be
10 found at length in said certified copy hereto annexed, as above stated, as Document "B;" that the water supplies provided for by this contract and provided to be paid for in the manner and form aforesaid is the identical water supply mentioned and set forth in the charter of said company, which is a contract between the city of New Orleans and said company during the life of the company.

Now, your petitioners aver that the said ordinance No. 909 and the said pretended contract made under and by virtue of the said ordinance were not authorized by the terms of the said act 56 of 1884; that the Legislature in passing the said act did not contemplate that the contract relations between the city of New Orleans and the water-works company, as set forth in its charter as interpreted by the supreme court, should be in any manner changed, unless it should be for the purpose of enabling the said water-works company to furnish clear and filtered water to the city of New Orleans in lieu of the muddy Mississippi water which is furnished by the mains of the New Orleans Water Works Company to the city, and which is contemplated to be furnished under and by virtue of the said contract and ordinance; that, as appears by the title and sections one, two, and four of said act, the Legislature did not contemplate that the city of New Orleans should make any contract with said company, unless it was a contract for pure and filtered water, which the said contract does not cover and was not intended to cover; that the only proper and lawful interpretation of the said act was that the city of New Orleans, before it demanded the taxes from the water-works company in any year, should make a
11 provision in its budget for the payment to said water-works company of the amount due said company, under and by virtue of its charter as interpreted by the supreme court, for the water furnished in that year by said company, and that the value of the water mentioned in the said section 1 did not mean a new value to be fixed by contract between the company and the city; did not mean the value upon any *quantum meruit*, but meant the value of the water as fixed in the charter of said company, which was binding upon both the city and the water-works company.

And your petitioners aver that if the said act did contemplate that the city of New Orleans and the water-works company should enter into a new and different contract stipulating what the value of the water to be supplied by the said company under its charter to the city was, then and in that event the said act is unconstitutional, null, and void, and of no effect for this:

1st. That it violates paragraph 13, article 46, of the constitution

of 1879, which declares "that the General Assembly shall not pass any local or special law creating corporations or amending, renewing, extending, or explaining the charter thereof."

2nd. That it violates article 57 of said constitution of 1879, which declares "that the General Assembly shall have no power to release or extinguish or to authorize the releasing and extinguishing, in whole or in part, the indebtedness or liability of any corporation or individual to this State or to any parish or municipal corporation therein."

3rd. That it violates article 234 of the said constitution of 1879, which provides "that the General Assembly shall not
12 remit the forfeiture of the charter of any corporation now existing, or renew, alter, or amend the same, nor pass any general or special law for the benefit of said corporation, except on the condition that said corporation shall thereafter hold its charter subject to the provisions of this constitution."

It also violates article 45 of the said constitution and said act, which, under act 29 of the constitution, — because it embraces more than one object.

And your petitioners aver that in accordance with this unlawful contract the city of New Orleans has in its budget for the year 1885 set aside and appropriated the sum of $68,340 to be paid to the said water-works company for the water supply which it is bound to furnish the city of New Orleans under its charter for the price and sum of its annual taxes, which for the year 1885 amount to the sum of $11,352; that out of this appropriation there has already been paid to the water-works company the sum of $39,875, and that the city council, unless restrained by an injunction from this honorable court, will continue to make appropriations to pay the balance of said sum, and will continue to recognize the validity of said contract, and will continue to pay over monthly to said company the amount stipulated under said contract to be paid.

That your petitioners have, through their committee of one hundred citizens, presented a petition to the council protesting against
13 this contract, called their attention to its unconstitutionality and illegality, and asked that the council should take some action to repudiate this extraordinary burden imposed upon the tax-payers of the city of New Orleans without reason and without cause, but the city council has neglected to take any action, and your petitioners are informed and believe and so charge that they do not intend to take any action to relieve the city government from this burden, but will continue and intend to continue to recognize the said contract from year to year and to make appropriations to pay it.

And your petitioners show unto your honors that the said contract is illegal, *ultra vires* unconstitutional, null and void, and of no effect, and that it is oppressive upon the tax-payers of the city of New Orleans, and that they have no other relief from the said contract but by an appeal to the equity powers of this court, and ask your honors to issue an injunction, directed to the city of New Orleans and to Isaac Patton, treasurer thereof, and to John H. Hardy, comptroller thereof, enjoining, prohibiting, and restraining them

and each of them from making any appropriation in favor of the water-works company under and by virtue of the said contract of the 3rd of October, 1884, or under and by virtue of the said ordinance No. 909, and enjoining the said Hardy from drawing any warrants in favor of the said water-works company on any appropriations that may be made in its favor under the said contract by the council, and enjoining Isaac W. Patton, treasurer, from
14 paying any warrants so drawn.

Wherefore your petitioners pray that an injunction may issue in the terms above set forth and on the conditions above set forth, and that the city of New Orleans and the New Orleans Water Works Company, Isaac W. Patton, treasurer of the city of New Orleans, and John H. Hardy, comptroller of the city of New Orleans, may be cited to appear and answer this petition, and that after due proceedings had there may be judgment in favor of your petitioners perpetuating the said injunction and declaring the said contract of the 3rd of October, 1884, and the said ordinance No. 909, council series, adopted the 23rd day of September, 1884, and the said acts 46 of the acts of 1884, unconstitutional, null, void, and of no effect or validity, and perpetually enjoining the city of New Orleans and its officers and servants and the New Orleans Water Works Company and its officers and servants from setting up the said contract or any part thereof or the said act or any part thereof to be valid and binding upon the city of New Orleans, and perpetually enjoining the city of New Orleans from making any appropriations under the said contract or any appropriation to the New Orleans Water Works Company in payment of its water supply in any year in excess of the amount of the annual taxes which may be assessed against it for that year by the city of New Orleans.

And your petitioners pray for all further and necessary orders in the premises and for general relief.

15 (Signed) T. J. SEMMES & PAYNE.
" EDGAR H. FARRAR.
" RICHARD H. BROWNE.
" E. D. WHITE.
" C. E. SCHMIDT.

Exception—City of New Orleans. Filed November 19th, 1885.

EDWARD CONERY *et al.*
vs.
NEW ORLEANS WATER WORKS COMPANY *et al.* } No. 15774, Division "C."

For exception now comes the defendant, through her city att'y, duly authorized and instructed by the council thereof, and says:

1st. The petition discloses no legal cause of action.

2nd. The plaintiffs show no interest, as required by law, to institute and maintain this suit.

Wherefore she prays to be hence dismissed with costs.

(Signed) W. H. ROGERS, *City Att'y.*

Exception—New Orleans Water Works Co. Filed November 23rd, 1885.

EDWARD CONERY *et al.*
vs.
THE NEW ORLEANS WATER WORKS CO. } No. 15774, Division "C."

16 Civil District Court for the Parish of Orleans.

And now comes the defendant, The New Orleans Water Works Company, by J. R. Beckwith, its att'y, and, saving and reserving all and all manner of exceptions and defenses not hereinafter set forth and pleaded, for exception to the said petition, as well *as* to the action as brought by the plaintiffs collectively as to the action of each several action of each several plaintiffs, *such* that the plaintiffs collectively and such plaintiffs severally ought not to further have and maintain their action against this defendant, and for exception shews—

1st. That there is no privity between said plaintiffs, and no lawful right exists or is shown in said petition to join in or collectively bring and prosecute this supposed demand or action against this defendant; that if said plaintiffs have or possess any right of action against this defendant about or concerning the matters complained of in said petition, such action is several and distinct as to each plaintiff, and that said plaintiffs cannot in law join said several actions in one suit.

2nd. That said plaintiffs, either collectively or severally, do not possess or show or disclose any right to institute or prosecute said action or stand in judgment therein.

3rd. That it appears from said petition, if said plaintiffs have in said petition shown, as disclosed, any collective or several right of actions against this defendant (which is at all times denied),
17 then and in that case it does not appear, nor is it the fact, that said plaintiffs have ever solved in this action any money or pecuniary interest to be adjudicated which amounts to the sum of one hundred dollars or any sufficient sum to give this court jurisdiction to hear or determine said action.

4th. That the alleged committee of one hundred is a legal myth without juridical existence or *poses* to sue or stand in judgment, and that the individual plaintiffs show no right to stand in court as party to any form of action about or concerning the matters set forth in said petition.

Wherefore by reason of the said matters above pleaded and set forth said defendant prays judgment of the court that the said plaintiffs are without right to maintain or prosecute said action, and that the same be dismissed at plaintiffs' costs.

And in event that the foregoing exceptions are overruled and held insufficient, at all times saving and reserving all and singular all of said several defenses and exceptions and in no manner waiving the same, for peremptory exception in this behalf said defendant saith that said plaintiffs, either collectively or severally, have not set forth

and do not in said petition disclose, set forth, or show any sufficient and lawful cause of action or right to any relief against this defendant, and prays judgment against the said plaintiffs individually and collectively that their said action be dismissed with cost, and will ever pray, etc.

(Signed) J. R. BECKWITH,
Att'y for N. O. Water Works Co., Defendants.

18 *Note of Evidence on Exception. Taken in Open Court on Friday, Nov. 27, 1885. Filed February 12th, 1886.*

Civil District Court, Parish of Orleans.

E. CONERY *et al.* vs. NEW ORLEANS WATER WORKS CO., } No. 15774, Division "C."

By Mr. SEMMES: I move the court to strike out the fourth point in the exception of defendant as being impertinent; and after argument the court held that the fourth ground of the exception was impertinent and ought not to figure on the record as part of the pleadings, and granted the motion.

By Mr. BECKWITH: I would ask the court to state precisely what is stricken out?

By the COURT: In order to avoid confusion, I will state what is stricken out. The fourth ground of exception is that "the alleged committee of one hundred is a legal myth, without juridical existence or power to sue or stand in judgment, and that the individual plaintiffs show no right to stand in court as party to any form of action about or concerning the matters set forth in the said
19 petition." What I strike out is the words: "That the alleged committee of one hundred is a legal myth, without juridical existence or power to sue or stand in judgment." That is stricken out because the committee of one hundred are not here invoking the court's aid or the court's process."

By Mr. BECKWITH: I reserve a bill to the ruling of the court.

By Mr. ROGERS: Under instruction of the city council I have filed an exception of no cause of action.

By Mr. BECKWITH: I offer in evidence a copy of the budget and expenditures of the city of New Orleans and the ordinance imposing taxes for the year 1885.

By Mr. SEMMES: Then you must produce the documents.

By Mr. BECKWITH: I will produce it and file it in the record.

By Mr. SEMMES: I object, because there is no paper produced which I can inspect to see whether or not it is admissible in evidence.

By the COURT: The objection is maintained.

By Mr. BECKWITH: Then I ask for a continuance on the ground of surprise.

By Mr. SEMMES: I object to a continuance on the ground that if

the document was here it would not be admissible in evidence, as no evidence as to facts is admissible at all.

By Mr. SEMMES: The objection as to the non-production of the documents offered in evidence by Mr. Beckwith is withdrawn, with leave to him to supply the document if it be admissible in evidence at all.

20 By Mr. SEMMES: I still insist, however, on my objection to the admissibility of the evidence on the ground that no evidence whatsoever was admissible on the prayer of the exception.

And, after argument, the objection was maintained by the court.

By Mr. BECKWITH: I take a bill of exceptions to the ruling of the court, and call the court's attention to the fact that there is an exception of no cause of action, and then this one in the alternative.

By the COURT: I shall regard this plea of yours as a general demurrer to the cause.

By Mr. BECKWITH: The bill of exceptions formally will be the tender of this ordinance and the objection to it and the refusal of the court to permit it to be offered in evidnce and the ruling of the court.

By Mr. BECKWITH: I offer to prove by the parties themselves that each individual plaintiff, tax-payer though he be, has not returned to the city a list of the taxable property to him belonging in order to be assessed, nor is he assessable, as the record stands, upon the list of taxable property for the current year with what may subject him to a payment (to the $68,000 stipulated) amounting to $1,500.

By Mr. SEMMES: I object to it for the same reason; and the objection was maintained.

By Mr. BECKWITH: I also take and tender a bill of exceptions to the ruling of the court in that respect.

Motion to Strike Out 4th Ground of Def'ts' Exception. Filed Nov. 27th, 1885.

21 Division "C," Civil District Court.

E. CONERY *et al.*
vs.
N. O. WATER WORKS CO. } No. 15774.

Now come the plaintiffs and move the court to strike out the fourth ground of exception filed by the New Orleans Water Works Company because the same is impertinent.

(Signed) T. J. SEMMES,
" R. H. BROWNE,
" E. H. FARRAR,
" E. D. WHITE,
" E. E. SCHMIDT,
Of Counsel for Plaintiffs.

Exception Submitted.

Extract from the Minutes of December 11th, 1885.

Present: The Hon. Henry L. Lazarus, judge.

E. CONERY *et al.*
vs.
N. O. WATER WORKS CO. } No. 15774.

The exception in this case continued to this day for briefs being submitted, the court took the same under advisement.

Judgment on Exception.

22 Division "E," Civil District Court for the Parish of Orleans.

EDWARD CONERY *et al.*
vs.
THE NEW ORLEANS WATER WORKS and Others. } No. 15774.

In the matter of the exceptions herein filed and submitted to the court for adjudication, for the reasons contained in the written opinion of the court this day delivered and filed—

It is ordered, adjudged, and decreed that the second ground of exceptions filed by The City of New Orleans and the first and third grounds of exceptions filed by The New Orleans Water Works Company, defendants herein, be sustained, dismissing the plaintiffs' demand with costs.

Judgment rendered January 18th, 1886.

Judgment signed February 1st, 1886.

(Signed) HENRY L. LAZARUS, *Judge.*

Motion of Appeal Filed February 12th, 1886.

Civil District Court, Parish of Orleans.

EDWARD CONERY *et al.*
vs.
NEW ORLEANS WATER WORKS CO. *et al.* } No. 15774.

On motion of Thos. J. Semmes, E. H. Farrar, R. H. Browne, E. D. White, and Chas. E. Schmidt, att'ys for the plaintiffs,
23 and on suggesting to the court that plaintiffs are aggrieved by the judgment herein rendered on January 18th, 1886, and signed on Febrary 1st, 1886, dismissing their action; and on further suggesting that they are informed and believe there is error in said judgment to their prejudice, and that they are desirous of appealing therefrom; it is ordered that plaintiffs be allowed an appeal from said judgment, returnable to the supreme court of the State of Louisiana on the 3rd Monday in February, 1886, on their giving bond as the law directs in the sum of two hundred and fifty dollars.

Appeal Bond. Filed February 12th, 1886.

EDWARD CONERY, JR., *et al.*
vs.
N. O. WATER WORKS CO. *et al.* } No. 15774.

Know all men by these presents that we, Edward Conery, Jr., James B. Sinnott, Philip Hirsch, Geo. E. Sears, Fred. J. Odendahl, William Dillon, Wm. H. Renaud, B. F. Glover, J. B. Camors, Alfred T. Baker, Joseph Simon, Nicholas Burke, Henry T. Cottam, Philip Thompson, Andrew Hero, Jr., Alfred Moulton, Louis Bush, James A. Chalaron, George H. Dunbar, E. I. Kurschedt, Jno. W. Labouisse, Henry Lochte, I. L. Lyons, Ambrose A. Maginnis, Edward Miltenberger, Chas. J. Meyer, Thomas W. McEnany, John Phelps, Joseph Schwartz, John Simpson, Edward Thompson, Samuel H. Trufant, Gideon Townsend, Anthony Vizard, Nath. D. Wallace, George Q. Whitney, Pearl Wight, Alfred A. Woods, Octave F. Valette,
24 Newton Buckner, David A. Calder, J. G. Clark, Michael H. Rogers, as principals, and Edgar H. Farrar, as surety, are held and firmly bound unto W. I. McGeehan, clerk of the civil district court for the parish of Orleans, his successors, administrators, and assigns, in the sum of two hundred and fifty dollars; for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated in the city of New Orleans on this twelfth day of February, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas the above-bounden Edward Conery, Jr., and the other persons above named and bound this day filed a motion of appeal from a final judgment rendered against them in the suit of Edward Conery, Jr., *et al. vs.* New Orleans Water Works Co. *et al.*, No. 15774 of the civil district court for the parish of Orleans, on the 18th day of January, 1886, and signed on the 1st day of February, 1886:

Now, the condition of the above obligation is such that the above-bound Edward Conery, Jr., and others above named shall prosecute their appeal and shall satisfy whatever judgment may be rendered against them, or that the same shall be satisfied by the proceeds of the sale of their estate, real or personal, if they be cast in the appeal; otherwise that the said Edgar H. Farrar shall be liable in their place.

(Signed) EDWARD CONERY, JR., ET ALS.,
By E. H. FARRAR, *Att'y.* [SEAL.]
(Signed) E. H. FARRAR, *Surety.* [SEAL.]

Stipulation. Filed February 24th, 1886.

25 Civil District Court, Parish of Orleans.

E. CONERY *et al.*
vs.
N. O. WATER WORKS CO. *et al.* } No. 15774.

The plea and exception herein filed by the city of New Orleans having been lost, it is agreed that the substance of said plea and exception was—

1st. That plaintiffs had no capacity to stand in judgment to maintain this action; and,

2d. That the petition set forth no cause of action.

And it is agreed that this stipulation shall be copied in the transcript of appeal in lieu of the said lost document.

(Signed) E. H. FARRAR, *Att'y Plaintiffs.*
" J. R BECKWITH,
" W. H. ROGERS, *Ass. City Att'y.*

Answer of City of New Orleans. Filed May 27th, 1887.

Civil District Court for the Parish of Orleans.

EDWARD CONERY *et al.*
vs.
THE NEW ORLEANS WATER WORKS CO. *et al.* } No. 15774, Division "C."

26 And now comes Walter H. Rogers, city attorney for the city of New Orleans and for and in behalf of the city of New Orleans and all of the defendants except The City — New Orleans Water Works Company, and, reserving all and singular the exceptions hereinbefore pleaded herein and in no manner waiving the same, for answer to the said plaintiffs' petition denies all and singular the allegations therein contained in manner and form as the same are set forth and contained in said petition, and prays judgment against the said plaintiffs' demand, with costs.

(Signed) W. H. ROGERS, *City Att'y.*

Order of Recusation.

Extract from the Minutes of May 27th, 1887.

Present: The Hon. Albert Voorhies, judge.

EDWARD CONERY, Jr., *et al.*
vs.
NEW ORLEANS WATER WORKS CO. *et al.* } No. 15774.

The court recuses itself in this cause for having been employed as counsel therein.

Stipulations. Order to Withdraw Answer. Filed May 30th, 1887.

E. CONERY, Jr., *et al.*
vs.
THE N. O. WATER WORKS CO. *et al.* } No. 15774, Division "C."

27 Civil District Court for the Parish of Orleans.

It is, at the request of J. R. Beckwith, att'y for def't, The New Orleans Water Works Company, *it is* stipulated that the defendant, The New Orleans Water Works Company, may withdraw its answer to the petition, and that the defendant may answer within five days.

May 30th, 1887.

(Signed) E. H. FARRAR,
Att'y for Pl'ffs.

(Signed) J. R. BECKWITH,
Att'y for the New Orleans Water Works Company.

Considering the above stipulations, it is, on motion of J. R. Beckwith, att'y for defendant, ordered that said defendant have leave to withdraw said answer, as stipulated.

Answer of N. O. Water Works Company. Filed June 3rd, 1887.

EDWARD CONERY, Jr., *et al.*
vs.
THE NEW ORLEANS WATER WORKS COMPANY *et al.* } No. 15774, Div. "C."

Civil District Court for the Parish of Orleans.

And now comes The New Orleans Water Works Company, defendant herein, and, saving and reserving unto itself all and singular each and all of the peremptory exceptions by it heretofore pleaded in this cause, and in no manner waiving any or all of said
28 defenses and exceptions, but at all times insisting thereon, and in order that this cause may be expedited and put at issue as to all issuable matter therein, appearing herein by its undersigned attorneys, for answer to said plaintiffs' petition saith that it denies all and singular all of the matters in said petition contained and set forth, and takes full issue thereon, except as to such matters as are hereinafter specially admitted or admitted and avoided.

That the defendant specially denies that the plaintiffs have any legal or pecuniary interest in the matters complained of in said petition, or are or have been or will be in any manner damaged or subjected to any loss or damage by reason of any matter or thing set forth or averred in said petition.

Defendant further specially admits that the Legislature of the State of Louisiana, by and with the approval of the Governor of the State, adopted and promulgated act No. 33 of the extra session of the Legislature in the year 1877, a true copy whereof is annexed to

this answer and made a part hereof, marked Exhibit "A," and aver that the same was promoted and secured by the city of New Orleans as a scheme and device to relieve itself of a large portion of its interest-bearing debt and of an annual deficit in carrying on water works in and for said city, and avers that no person would accept the conditions of said act, and that the same was in all re-
29 spects unavailing for any purpose, and that there was no organization of any corporation under said legislation as it then stood.

Defendant admits that afterwards the said Legislature, at the instance and request of the city of New Orleans, did adopt and enact act No. 43 of the acts of 1878, approved February 26th, 1878, modifying and changing the terms of the act of 1877 above set forth, as appears by a copy thereof hereto annexed and made part hereof, marked Exhibit "B," and that under the provisions of said acts and legislation the defendant, The New Orleans Water Works Company, was organized and came into existence, and that said legislation constitutes the charter of this defendant and a contract between this defendant and the city of New Orleans and the State of Louisiana, the terms, provisions, compacts, and covenants whereof are guaranteed unto this defendant in their full and exact fulfillment and observance by the Constitution of the United States, and particularly by section 10 of article one of said Constitution; that said compact and agreement was accepted by the said defendant on the faith of said guarantee and protection and the sum of two millions of dollars ($2,000,000) or thereabouts paid as consideration for said covenants, which were or ought to have been kept and observed by the city of New Orleans and the State of Louisiana and all of the citizens and inhabitants thereof.

30 Defendant specially denies that the construction put upon said contract as set forth in said petition is correct, just, or true, but asserts that the same is in all things untruthful, unjust, and dishonest and a fraud upon the rights of the defendant.

Defendant admits that there was litigation on the part of the city of New Orleans with this defendant relative to an alleged municipal tax assessed against this defendant for the year 1881, but in all things denies that the same is correctly or truthfully set forth in said petition, or that the result or effect thereof was, is, or ought to have been the effect, result, or condition of things set forth and averred to have been the result and legal effect of such litigation as set forth in said petition, and takes full issue of facts and law upon all of that portion of said petition relating to said litigation and the legal result or effect thereof or of any judgment, decree, or determination therein set forth in said petition.

Further answering, said defendant saith that it is not true that this defendant ever sought to or did obtain any unjust advantage over the city of New Orleans, as averred in said petition; avers that the city of New Orleans is and at the time referred to in said petition was the largest single shareholder in the shares and stock in the New Orleans Water Works Company, and had and has by law a fixed representation in the board of directors of said company

larger than is proportional to its holding of shares in the
31 capital stock of said company, and has been, is, and must be at all times through its directors a participant in the management and direction of the affairs of said defendant, and cannot be deceived or imposed on by any act of the board of directors of said defendant company. Defendant admits that the Legislature of the State, with the approval of the Governor thereof, did make and promulgate act No. 56 of the acts of 1884, but denies that the terms and true legal construction thereof are correctly set forth in said petition, but makes the said act No. 56 a part of this answer, marked Exhibit "D," in order that the truth in that behalf and respect may appear in the record of this cause.

Defendant specially denies that said act No. 56 was intended to, did, or does confer on this defendant any advantage or benefit or affect, change, or modify in any respect or particular the charter of this defendant, and avers that if it did benefit or *advantage conferred* or otherwise affect or modify the charter of defendant, or could be so construed, the act in that case would be of no effect to accomplish that end until formally and solemnly accepted by the act of the shareholders in said corporation acting together in a general meeting of such shareholders, and avers that there never has been any such action or acceptance of said article No. 56, and for that reason the said act in no manner has affected the charter of this defendant.

And defendant, further answering, saith that it is not true
32 that said article No. 56 is subject to the vices and alleged nullities charged against said act in said petition, nor is it true that the validity of the said contract assailed in said petition depends upon the validity of said act No. 56 of the acts of 1884, nor was said act of 1884 necessary or material to authorize the city of New Orleans to make and enter into said contract with this defendant complained of in said petition, but, on the contrary thereof, the city of New Orleans has full and competent authority under the charter of the said city and without said act 56 to make and enter into said contract with this defendant about and concerning all the matters contained in said contract; and defendant avers that the validity of said contract does not depend upon said act No. 56 of the acts of 1884, and is and in all things would be *in all things* a valid contract and of full force and effect if said act No. 56 had never been adopted and is not involved by reason of any supposed vice or supposed invalidity of said act No. 56 set up in said petition. Defendant denies that the water supply provided and contracted for in said contract by the city of New Orleans is the same as provided in the charter of said defendant as a consideration for the covenant of exemption from taxation, but is for another, different, and increased supply of water to be delivered at higher pressures and at different localities for additional purposes and with different distribution from the supply provided for in said charter of defendant, and that the delivery of said new water supply as set forth in said contract is attended with much greater expense
33 and cost to this defendant than was or is the supply named in defendant's charter.

That it is not true that said price contracted to be paid by the city of New Orleans for said water supply is unfair or exorbitant, but in truth is far below the real value thereof; that this defendant is required to pump daily about ten million gallons (10,000,000) of water for the daily supply of the city of New Orleans and its inhabitants, and that of said ten million gallons (10,000,000) nearly one-third thereof is daily consumed and expended in the supply of the city of New Orleans as a corporation for consumption for municipal purposes under the terms of and for the purposes named in said contract, and that there is no profit to said defendant in said supply at the rate of pay therefor stipulated in said contract; and the said defendant avers that it is impossible for the city of New Orleans to obtain the same quantity of water for said purposes by the use of a plant of its own and by and with its own machinery by the expenditure of said contract price or money.

That while the said water works was in possession and ownership of the city, after the purchase thereof from the late Commercial Bank and prior to the transfer thereof to the defendant company, the like quantity of water for public supply cost the said city of New Orleans a sum far in excess of the sum named in said contract.

That it is not true that either in law or fact the said de-
34 fendant is compelled to submit to the active abrogation of its rights in and under the statutory contract of exemption from taxation and yet supply the city of New Orleans with a public water supply for the inconsiderable sum or sums named in said petition actually far below the cost of such supply to this defendant, and that said proposition as formulated in said petition is inequitable, unjust, and palpably dishonest in character; that if there be any law or authority vested in the judicial or any other department or branch of the government of the State of Louisiana by, through, or under the operation whereof this defendant can be compelled to submit to such wrong the same has been incorporated into the said government long since the date when the contract between this defendant and the State in said defendant's charter was entered into and was completed as a contract, and as such features or part of the powers and of the government of said State are illegal devices for the impairment of the obligations of contracts and as such repugnant to the said Constitution of the United States and as such null and void in all respects and particulars; and said defendant claims unto itself in protection of said contract assailed in plaintiffs' petition all and singular all of the rights, privileges, benefits, and guarantees secured to it by the said Constitution of the United States of America, as well the provisions thereof specially referred to in this answer as all others in said Federal Constitution contained and set forth, therein guaranteeing the faithful observance of all contracts against bad faith or impairment by the States.

35 And said defendant, as to all and singular all other matters as averments of facts and law in said petition contained, takes issue of law and fact thereon and avers that the said contract assailed in said petition is in all things valid and binding in law as to all of the parties thereto and as to all of the inhabitants and tax-

payers of the city of New Orleans, and as a contract was lawfully entered into on the part of the city of New Orleans as a municipal corporation in the lawful exercise of its legislative and administrative capacity and by and through the expression of the will of the legislative and executive departments of said goverment of said city of New Orleans, made in due form and within the limit of the power of administration given to said city of New Orleans by its charter, and as such administrative act is not receivable by the judicial department of the State government.

This defendant prays for judgment against the said plaintiffs and their demands; that the same be in all things rejected, and that they be condemned to pay all costs of this action; and will ever pray.

(Signed) BLANC & BUTLER.
(Signed) GUS A. BREAUX.

Exception Submitted.

Extract from the Minutes of June 24th, 1887.

Present: The Hon. F. A. Monroe, judge.

36 EDWARD CONERY, Jr., *et al.*
vs.
NEW ORLEANS WATER WORKS COMPANY *et al.* } No. 15774, Division "C."

By consent of E. H. Farrar, for plaintiff, and Messrs. J. R. Beckwith & W. H. Rogers, for defendants, the exception in this case was submitted to the court upon briefs this day presented.

Exception Overruled.

Extract from the Minutes of January 2nd, 1888.

Present: The Hon. F. A. Monroe, judge.

EDWARD CONERY, Jr., *et al.*
vs.
THE NEW ORLEANS WATER WORKS COMPANY *et al.* } No. 15774, Division "C."

For the reasons assigned in the written opinion of the court on this day delivered and filed, it is ordered that the exception of no cause of action herein, filed by the def'ts, be overruled at their costs.

Opinion on Exception. Filed January 2nd, 1888.

E. CONERY, Jr., *et al.*
vs.
N. O. WATER WORKS CO. *et als.* } No. 15774, Division "C."

Civil District Court.

37 This cause was originally allotted to division "E," to which division were presented two exceptions, to wit:

1. That plaintiffs have no capacity to stand in judgment.

2d. That the petition discloses no cause of action.

The first exception was maintained in the lower court, but on appeal the judgment was reversed, and the cause was remanded to be tried upon the second exception or upon the merits, as the case may be. The judge now presiding in division "E," having recused himself and the cause having been allotted to this division, it becomes my duty to pass upon the exception of no cause of action. The petition is that of a number of gentlemen, who allege—

That they are residents of New Orleans and pay taxes exceeding in the aggregate $10,000 per annum; that the Legislature, in '77, passed an act, 33, the declared object of which is to incorporate the New Orleans Water Works Company, to promote public health, to afford greater security from fire, to furnish the inhabitants of New Orleans with an adequate supply of pure water, to authorize said company to issue bonds, &c., &c.

That said act provides for the incorporation of a company with a capital of $2,000,000, and grants to it the exclusive right to furnish the city of New Orleans and its inhabitants with water from
38 the Mississippi and other rivers for fifty years, and that the eleventh section of said act, among other things, provides "that the city shall be allowed to use water from the pipes and plugs of said company now laid or hereafter to be laid free of charge for the extinguishment of fires, cleansing of the streets, and for the use of all the public buildings, markets, and charitable institutions, and that said company shall place, free of any charge whatever, two hydrants of the most approved construction in part of such square where a main pipe shall be laid, at a suitable distance from each other, from which a sufficient quantity of water may be drawn for the extinguishment of fires, for watering the streets and cleansing the gutters, and for any other public purpose; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners.

"It shall be the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter, and, in consideration thereof, the franchises and property of the said New Orleans Water Works Company used in accordance with this act shall be exempt from taxation, State, parish, and municipal."

That by act 43 of '78 the word "State" was stricken out of said section, so that the company was made liable to State taxation.
39 That said act was accepted by the city and by the holders of water-works bonds and of city indebtedness, and the company was organized and all property acquired by the city from the Commercial Water Works Company transferred to it, and that it entered upon the discharge of its functions and duly complied with the provisions of said law.

That when said act was passed it was known to all persons, including the incorporators of said company, that the Legislature had no power to exempt property from taxation, except that actually

used for church, school, or charitable purposes, and that the exemption contained in said act was therefore null; that for several years, however, the company supplied the city with water, and no city taxes were demanded, but that in 1881 the city sued for taxes of that year and the company reconvened and demanded a large sum for water furnished; that there was judgment in favor of the city for the tax claimed and in favor of the company upon the reconventional demand for the value of the water supplied, but that on appeal to the supreme court the judgment in favor of the city for the tax was affirmed, whilst that in favor of the company was reduced to an amount equal to that allowed the city for the tax, viz., from $40,281.87 to $11,487.87.

That the supreme court, interpreting the legislative contract represented by the charter of said company, held that under it the company could not recover from the city for water furnished in any year a greater sum than the amount which might be found due by it to the city for taxes for such year; that subsequently
40 the company, striving to obtain an unjust and unlawful advantage, procured the passage of act 56 of 1884, entitled "An act to provide for the supply of water to the city of New Orleans, &c."

That the first section of said act declares: "That in all instances of the taxation of the franchises or property of the New Orleans Water Works Company for any year or years by or for the city of New Orleans or for municipal purposes, whether such taxation be for past or future years, and the said company be in any manner obliged to pay, notwithstanding the exemption granted in section 11 of act No. 33 of acts of 1887, extra session, then in all such instances the city of New Orleans is hereby empowered and required to pay the said company the value of all the water the said company has supplied or shall supply during any year or years for which said taxes have been or shall be levied to or for the use and purposes of the city of New Orleans, its public buildings, markets, streets, gutters, extinguishment of fires, or for other public purposes."

That the second section provides: "That in all instances of such taxation contrary to said exemption or any future year or years the city of New Orleans shall provide in its budget or shall set aside and appropriate a sum sufficient to pay for the said water supply for said year or years, and unless this be observed and done the said company shall not be compelled to deliver water for the uses and purposes aforesaid."

That the third section provides: "That any taxes already imposed for any year contrary to said exemption shall not be exacted
41 nor any penalty or interest accrued be demanded thereon or any begin to run until said city shall have provided for the payment of the water supplied in said year or provision made therefor in law or equity."

That the fourth section provides: "That, to secure the inhabitants of New Orleans and to the use of the city a supply of filtered or clear water, the city of New Orleans be, and is hereby, empowered to con-

tract with the said company and determine upon terms and conditions, and fix a price for obtaining from said company such supply of clear or filtered water."

That the fifth section provides: "That nothing in this act shall be construed as in any manner abridging or otherwise affecting any of the rights, franchises, and privileges, heretofore granted to said company, but all such rights, franchises, and privileges, shall continue and belong to said company."

That the sixth section provides: "That all laws or parts of laws inconsistent herewith be, and are hereby, repealed, and this act shall have effect from and after its promulgation."

Petitioners further aver that, pretending to act under said statute, the city council passed ordinance No. 909 (of which they annex a copy), authorizing the mayor to contract with said company upon the terms set forth in said ordinance, and that upon October 3rd, 1884, the mayor entered into a pretended contract by notarial
42 act (of which they also annex a copy), whereby, for himself and the council, he undertook to bind the city for the unexpired term of the charter of said company—exceeding forty years—to pay to said company $60 per annum for each fire-plug, fire-hydrants and fire-well connected with its main pipes, of which there are now 1,139, and which number shall be the least measure of the annual payments to be made to said company; to pay said company annually $60 for each additional hydrant, fire-well, or fire-plug exceeding said number of 1,139, and hereafter attached to said mains; to inform the company of any increase or decrease of said plugs, etc.; to make prompt and sufficient appropriations, &c.; to keep a distinct fund, etc., etc.

They further allege that the water supply thus contracted for is the identical supply provided for in the charter of said company, which is a contract between the city and said company during the life of the latter; that said ordinance and contract were not authorized by the terms of act 56 of 1884; that said act did not contemplate that the contract relations between the city and the company as set forth in the charter aforesaid should be in any manner changed unless for the purpose enabling the city to obtain pure filtered water in lieu of the muddy water of the Mississippi, now provided, and which is contemplated by said ordinance and contract.

That the only true and lawful interpretation of said act is that the city, before demanding taxes for any year, shall provide for
43 the payment of the amount due for water under the charter of the company, as that charter has been interpreted by the supreme court, but that if said act contemplates a new contract other than that contained in said charter it is unconstitutional, in that it contravenes articles 29, 45, 46, 57, and 234 of the State constitution.

They allege that the city has appropriated (in the budget of 1885) $68,340.00 to pay said company for water supply for the year, and that said company is bound to furnish said supply of water for an amount equal to its taxes for such year—say $11,352.00; that there has already been paid out of said appropriation $39,875.00, and that further payments will be made unless enjoined; that the contract

in question is illegal, *ultra vires*, unconstitutional, & void, and is oppressive upon the tax-payers, & they pray for the injunction and for judgment, &c.

I. It is said that ordinance 909 & the contract made under it are not authorized by act 56 of 1884.

Considering all that is asked as to the rule of construction to be applied, this claim cannot be maintained.

There are three clauses to the preamble of the act in question—the first relating to the notice of the intention to apply for the passage of the act, and the second and third reading as follows, to wit:

"Whereas the New Orleans Water Works Company is being subjected to municipal taxation notwithstanding the exemption
44 from taxation granted by its charter in consideration of water to be supplied to the city of New Orleans; and whereas it is possible and desirable to furnish the inhabitants of New Orleans with clear or filtered water from the Mississippi river: Therefore—

"SECTION 1. Be it enacted, &c."—

Following this, sections 1, 2, 3 of the act deal exclusively with the matter referred to in the second clause of the preamble and undertake to provide a remedy for the state of things therein described, and the provision made is unambiguous, and not only authorizes but requires the city to pay the value of all water furnished during any year for which a tax is exacted from the company. Section 4 then contains a distinct grant of power to the city to contract for water of a different character from that to which the preceding sections relate, thus carrying out *of* the idea expressed in the third clause of the preamble. The argument of plaintiffs' counsel has for its sole support the proposition that the supreme court, in interpreting the charter of the company, held that the amount of the tax found to be due by the company should be regarded as fixing and establishing, not the amount which the city was to pay for water furnished, but the value of the water so furnished.

This proposition is, however, not supported by the decision relied on, and certainly it would be a remarkable emanation of the judicial mind which would thus undertake to force a gallon into a quart pot.

The supreme court, in its original opinion, as I understand it, held that the exemption from taxation, as contained in the
45 charter, was not the sole consideration granted by the State for the water supply, and hence, the exemption being declared inoperative, if the water furnished exceeded in value the amount of the tax claimed the excess in such value was to be regarded as compensated by the other considerations granted to the company by the State. Mr. Justice Fenner, as the organ of the court, said: "Defendant's obligation to furnish water to the city is unrestricted as to amount, and it appears that the city has actually used *and the defendant has furnished water to the value of more than forty thousand dollars; the extent to which the consideration has failed is exactly the amount of the city's claim for taxes.*" (The italics are mine.)

The amount of the tax claimed and recovered was $11,484.87; so that the court found the value of the water to be $40,000.00, and

held the amount claimed and allowed for the tax to represent only that proportion in value of the water furnished which $11,487.87 bears to $40,000.00.

The opinion upon the rehearing places the judgment, in my opinion, upon a different footing, but the language of the court does not otherwise affect the facts stated in the original opinion than to confirm them, as stated, by conceding the authenticated inequality between the value of the water and the amount of the tax and holding that notwithstanding such inequality it was the intention of the contract that the one should be regarded as the equivalent of the other.

46 In the act of '84 the Legislature declares that when the city exacts the tax it shall pay the value of the water, and thus negatives the idea of making things of different values the equivalents of each other, or of fixing the value of the water upon any basis of equality or of inequality with respect to the tax.

If in view of the decision of the supreme court it had been the intention simply to provide for the payment for the water upon the basis established by that decision, it would, I think, have been so stated, and the act would have contained a proviso to the effect that the amount to be paid for water should in no case be more or less than the amount of the tax exacted.

II. It is said by counsel for defendant whilst they uphold the constitution- of the act of '84, that said act was immaterial and was not necessary to enable the city to make the contract in question, but that the city had the power to make said contract without being thus specially authorized.

The argument is that the contract was a compromise of a contention promising, if unsettled, to lead to a protracted and expensive litigation, and the power of the city in the premises is deduced from the general proposition that the city authorities have all the powers conferred by the charter in express terms and all implied powers necessary to the full exercise of those expressly granted.

This proposition is true, with the restriction that we must read into the charter such other acts of the Legislature as may
47 limit the power conferred by that instrument, and with this restriction the proposition proves too much for the present case, since the power to provide the water supply which would otherwise be conferred by or implied from the charter is in this instance governed by another act of the Legislature, claiming under which defendants' counsel do not hesitate to say in one of their briefs (referring to a clause in the city charter concerning the putting up of contracts for city work at auction): "If compelled by law to put up at auction or offer for public competition the price for which the water supply could be obtained, the water-works company, being the only possible bidder, was in a position to dictate its proposal in terms ruinous to the city." If, then, by reason of the legislative contract under which the defendant company exists the city has no power to contract with any other person or corporation for a water supply for itself or its citizens, —, nor can it be said that she has the power to override that legislative contract by changing its terms.

It is possible that a case may be presented in which the right of the city to compromise litigation arising out of contracts made for it by the State will not be recognized by the courts, but the petition of the plaintiffs in this suit does not set forth such a case, and, for the purposes of the present exception, the allegations of that petition are taken as true.

III. It is said by counsel for plaintiffs that act 56 of '84 contravenes various provisions of the State constitution, and among
48 them article 57, which reads as follows, to wit: "The General Assembly shall have no power to release or extinguish or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to this State or to any parish or municipal corporation therein, provided the heirs to confiscated property may be released of all taxes due therein at the date of its reversion to them.

It has been judicially ascertained and established by a judgment of the supreme court of the State by the terms of the eleventh section of its charter there is imposed upon the defendant company the obligation in favor of the State and of the city of New Orleans to furnish the latter with a given supply of water during the term of said charter, in consideration of the payment to it of a sum equal to the amount of the taxes exacted from it by the city. By the terms of the act of the Legislature in question it is proposed to release or extinguish this obligation in part, if not for the whole, and to this extent and in the light of the averments in the petition it appears to me that said — is within the constitutional prohibition.

In other words, if it be true, as alleged, that defendant is obliged under its charter to furnish annually to the city $40,000 worth of water in consideration of the enjoyment of its franchises and privileges and of the annual payments to it by the city of, say, $11,000, and the purpose of the act is to relieve it of the obligation to furnish said water save upon the condition that it be continued
49 in the enjoyment of said franchises and privileges, and paid annually the sum of $40,000, or the full value of the water, no reasonable man will pretend to deny that such a purpose carried into effect will operate a release of liability and obligation.

If the facts as set forth in the petition are not established and it turns out that the water which defendant is obliged to furnish is worth less than the amount exempted in the way of taxes, then, inasmuch as it has been held that the amount of the taxes is to be regarded as an equivalent for the water furnished, the application of the act would not have the same effect, and it is not likely that in such case the defendant will ask that it be applied. As the matter stands, however, and taking as true the averments of the petition, the application and maintenance of said act will accomplish that which the constitution in express terms forbids.

IV. I conclude, therefore (in view of the conditions under which the matter is presented to me, to wit, that every averment of fact contained in the petition must be taken as true for the purposes of the exception, and that the supreme court have judicially ascertained and declared the measure of defendant's obligations under its char-

ter, and have further decided that plaintiffs have a standing in court to prosecute this suit), that the council had no power to authorize or to make the contract attacked without special authority from
50 the State; that it was the purpose of act 56 of 1884 to confer such authority, but that said act applied to the state of facts set forth in the petition, in violation of article 57 of the constitution, and cannot be enforced. This conclusion does not affect the right of the city to contract for filtered water or the constitutionality of the statute, in so far as it relates to that subject, but it necessarily involves the overruling of the exception of no cause of action, and I deem it unnecessary to pass upon the other constitutional questions presented.

Amended and Supplemental Answer of the New Orleans Water Works Company. Filed June 12th, 1888.

EDWARD CONERY, Jr., *et als.*
vs.
N. O. WATER WORKS COMPANY and CITY OF NEW ORLEANS.
No. 15774, Division "C."

Civil District Court for the Parish of Orleans.

The defendant aforesaid (water-works company) files this answer to the petition of the plaintiff, with the leave of the court, as an addition to the answers filed by this defendant in this suit.

1. The act No. 33 of the extra session of the General Assembly of 1877 and the act No. 43 of the General Assembly of 1878 — contained in the charter of this respondent and are respectively pleaded
51 as a part of the answer, and they exhibit the franchises and property which this defendant acquired by lawful and operative contract with the State and this city. The section 11 of the act 1877 and section 6 of 1878 disclose the compensation this defendant was to receive for material, work and labor, care and diligence and services under the charter aforesaid. This defendant accepted this charter, complied with the conditions of the same, and was seized and possessed of the property and franchises, with the consent of the city of New Orleans, in its corporate capacity, until 1881, when the city, under the acts of the Legislature passed in the years 1880 and 1881 and under the instigation and impulse derived from the sections in the constitution adopted in 1879, being articles 258, 237, and 208, repudiated the contract in the charter of the company and caused an assessment of the property for taxes and the franchises conferred upon the company, and have violated the contract aforesaid since that date. During the period since 1881, when the repudiation was made and the infringement by the State and the city occurred, this defendant has maintained that the contract had been violated and its obligations impaired by the State of Louisiana and the city of New Orleans, to the damage of the defendant and contrary to the Constitution of the United States, article 1, section 10.

2. This defendant, for further answer, says that the water-works company was created by this State for the purpose of promoting the health, comfort, and improvement of the city of New Orleans
52 and the security of the property from destruction by fires. A system of water works for this purpose had been promoted by the State and the city some forty years prior to the enactments numbers 33 and 43, before mentioned. In the years 1877–1878 this property and the franchises previously existing had been purchased by the city of New Orleans under the authority of the General Assembly, and were owned in full property both in respect to franchise immunity and property, as is set forth in the enactments aforesaid. No taxation upon the property was paid by the city, but under the charter of the city it was held as fully exempt as the property of the United States and of the State was exempt. The charter of the water-works company shows that the city of New Orleans has issued bonds for the construction and purchase of these works and that there had been an habitual default on the part of the municipality of New Orleans. The acts of the General Assembly contain offers of sale of this property, the object being to re-establish it, and also "to permit the holders of the unpaid water-works bonds to convert the bonds into stock and to provide for the liquidation of the bonded and floating debt of the city." The recitals and statements of the legislative acts and the inducements offered among others was the necessity to make the sale to effect this object. The appropriation of the taxes to accrue from time to time for a water supply was deemed the most useful expedient to be employed. It was, therefore, considerately adopted by the General Assembly.

53 3. The water-works company avers that the renunciation by the city of New Orleans of the obligation of this contract received its encouragement and stimulant from the constitutional provision referred to and to collect the money from the water-works company for the current uses of the city. The water-works company was to all appearances selected to be the subject of a stroke of financial acuteness by which the city would be a creditor of the defendant without its consent and to its very great sorrow. The constitution of 1879 was not prohibitory of the eleventh section of the act of 1877, as modified by the sixth section of 1878. The aims of the General Assembly in the adoption of those acts were patriotic and constitutional; the property and franchises were at their date a part of the public domain. The property was unavailable in the possession of the city of New Orleans because of the extreme financial embarrassments and disorder which paralyzed all other faculties for administration and improvement. There was an imperative demand for a water supply for all of the objects specified in the charter. There was no collusion, nor fraud, nor haste, nor speculation. The project was considered for two separate sessions of the General Assembly. The only fund appropriated was the amount of municipal and parochial taxation to realize the sums contemplated to be paid for the supplies made for uses of a public nature. The limits of the parish and the municipality are identical; the State did not relinquish her own taxes; the parties—parish and city—would consume the water and

these taxes would be applied for the compensation and payment to the water-works company. The financiers of the city in 1881
51 and since have devised this scheme to collect money from the water-works company for taxes and compensate that for all water supplies in warrants on the city treasurer, not a desirable security at that rate.

4. The water-works company resisted, as far as practicable, these illegal and unwarrantable measures of the city of New Orleans. Their charter and the sections 33 and 43 in the acts containing them had been sanctioned by the General Assembly and by public recognition. As a matter of fact, the default of payment for the water supply delivered in 1881 remains unpaid until this date by the city of New Orleans.

It was manifest that the conditions of exorbitant seizures for taxes which had been remitted by the terms of this contract would not be persisted in without a jeopardy to all of those important objects which moved the General Assembly to organize the corporation and to determine the form of compensation contained in the charter. The water-works company might refuse to fulfill a contract when the other party to it claimed with violence to have all the pecuniary profits it yielded, whether to the vendor of the water or the vendee of the water supplied. The city corporation realized the illegality and injustice of such a condition and there was an agreement made with it that the corporation should recognize and fulfill their reciprocal obligations. This led to a reference to the General Assembly for some adjustment of the controversy under that authority.

5. The defendant, for further answer, says the act No. 56
55 is pleaded as a part of this answer. The fact that the New Orleans Water Works Company at that date, as "being subject to municipal taxation, notwithstanding the exemption granted by its charter," is declared in that act as true and the motive for legislative intervention, and this fact is undeniable. The remedy adopted by the General Assembly is contained in that act. The city of New Orleans was empowered and required to pay the water-works company the value of all of the water that had been supplied or should be supplied for which taxes have been levied to and for the uses and purposes of the city of New Orleans, and provides for the future—for the payment for the water—and thus relieves this subject from the embarrassment and defers to the popular sentiment in regard to exemptions from taxation.

Both corporations have comprehensive and sufficient powers to make this or other agreement to compose this difficulty, and the corroboration of the General Assembly of this conclusion and the sanction to this mode of adjustment is a guarantee of the propriety of this method of adjustment and settlement. The agreement between these parties is embodied in the ordinance No. 909, council series, adopted September 23rd, 1884, to carry out act No. 56. This defendant pleads that this ordinance and the act No. 56 are valid and constitutional enactments of the parties to the same, and are binding between the parties and obligatory, and that the same can-

not be impaired or set aside or annulled by the authority of the State or by its authority without a violation of the first article of and tenth section of the Constitution of the United States, before cited.

56 6. The defendant, for further answer, says that the water-works company have submitted to the necessity which originated from the measures successfully applied by the city of New Orleans under the stimulants afforded in the clauses of the constitution adopted in 1879 and which this defendant could not successfully resist. The taxes were all collected, the daily supplies to the city of water by the water-works company were consumed, and the only return to the water-works company was a continuous cry for more, upon the easy terms on which it had been obtained as exhibited in this answer.

7. This defendant, for further answer, says that the article No. 56, approved 7th July, 1884, was accepted as affording a sanction to the exercise of powers which were possessed on either part by these two municipal corporations, one the city of New Orleans, and this defendant and the city of New Orleans adopted an ordinance, No. 909, council series, and which this defendant accepted and became a party to the same by an act executed before a notary in company with the city of New Orleans and became a contract between them. By the terms of this contract the defendant became obliged to pay the taxes on the property of the corporation under the laws regulating taxes without opposing the contract of immunity contained in the acts Nos. 33 and 43, adopted by the General Assembly in 1877–'8 and containing the charter of this company. This contract is pleaded by this defendant as valid and operative thus made.

57 This contract has been in force since the 23rd September, 1884, the day of its date, and this defendant has regularly and constantly performed the conditions therein contained, and has not resisted the payment of the taxes assessed against them, and the city of New Orleans has accepted the acts of performance. This agreement was made as a concession to the city of New Orleans, the party to this agreement. There had been litigation, and there was and still is pending suits relative to it. The defendant adopted the agreement as affording a convenient form for the administration of the laws and ordinances, and which would be productive of peace and harmony.

The articles in the contract for extending the operations of the water works and for enlarging the supply are legal under the charter and provided for therein. The defendant denies the allegations and charges in the petition of any fraud, illegality, wrong-doing, or which calls in question the validity and binding operation of the act and the ordinance between these parties.

The petitioners are volunteers, have no connection with the contract or the statute No. 56, and no such right, title, or estate as entitles them to have or maintain this suit, and the defendant excepts peremptorily to their capacity to maintain it. This defendant prays that the court would dismiss the bill of the plaintiffs, and for all

other relief consistent with the facts shown to this honorable
58 court.

(Signed) J. R. BECKWITH,
Att'y for Defendant, N. O. Water Works Co.
" JOHN A. CAMPBELL,
Of Counsel for Defendants.

Order.

Let the amended and supplemental answer of The New Orleans Water Works Co., one of the defendants herein, be filed.

New Orleans, June 13th, 1888.

(Signed) F. A. MONROE, *Judge.*

Amended and Supplemental Answer of City of New Orleans. Filed November 3rd, 1888.

EDWARD CONERY, Jr., *et als.* *vs.* N. O. WATER WORKS CO. *et als.* } No. 15774, Division "C."

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

The amended and supplemental answer of the city of New Orleans, leave of the court therefor being had and obtained, respectfully represents—

That by the terms of act No. 33 of the E. S. of 1877 the
59 city is entitled to a supply of water from the New Orleans Water Works Co. free of charge, and that the guarantee of this law to the city, securing to it the benefits of free water, has not been and cannot be diminished without impairing the obligation of contracts and thereby violating art. 1, section 10, of the Constitution of the United States, and the city now pleads said art. 1, section 10, and invokes the benefit thereof, and further pleads said act 33 of 1877, E. S., as part of this answer; that, notwithstanding the premises, the late council of the city, on the 23rd day of September, A. D. 1884, did unlawfully pass ordinance 909, C. S., whereby the terms of said act No. 33 were attempted to be frustrated and set at naught, to the great detriment and injury of the city of New Orleans and in derogation of the rights of the city and of those of the inhabitants.

That in pursuance of said illegal ordinance the late mayor of the city entered into an alleged contract with the New Orleans Water Works Co. October 3rd, 1884, before Jos. D. Taylor, notary, and the said alleged contract is null and void; that it is, under color of giving force and effect to another act of the General Assembly of this State, to wit, act No. 56 of 1884, in direct violation of the terms of said act No. 33, in that it imposes heavy and burdensome charges on the city of New Orleans for a supply of water to be paid

said water-works Co., contrary to the terms and guarantee of said act No. 33.

That the alleged contract here referred to and ordinance
60 No. 909, which forms a part of said alleged contract and on which it is based, are *ultra vires*, null, and void, the same being without authority of law and in direct violation of acts of the Legislature Nos. 33 of the Ex. S. of 1877, 43 of 1878, 20 of 1882, and 56 of 1884.

That ordinance 909 is entitled "An ordinance to carry out act No. 56 of the acts of 1884, providing for a future water supply from the New Orleans Water Works Co. to and for the city of New Orleans and certain institutions, and regulating the use of water and the payment thereof," whereas said ordinance, instead of being in accordance with, is not only contrary to but in direct violation of the provisions of said act No. 56 of 1884; that the object of act No. 56 of 1884 purports to be to carry into effect section 11 of act No. 33 of the acts of 1877, E. S., whenever and wherever the city of New Orleans levies taxes on the water works Co., and that said act 56 of 1884 was enacted in consequence of the decision of the supreme court in the case of The City of New Orleans against The New Orleans Water Works Co., No. 9007 of the docket of the supreme court of Louisiana, and reported in the 36 Annual Reports, pages 432 *et seq.*, and for greater certainty said opinion is now pleaded as part of this answer.

That in the decision here cited the supreme court placed a construction and judicial interpretation on said section 11 of the act No. 33, and that the supreme court in deciding said cause determined the effect of the legislative contract made between the
61 city of New Orleans and the water works Co. by virtue of said act 33 of 1877, and declared that the water works Co., under and by virtue of the said contract, has no power to demand or claim or require from the city of New Orleans in any year any sum for the water supply, which it was bound under its charter to furnish to the city, greater than the amount of the city taxes for that year, and that by said section 11 of the charter of the water works Co. the Legislature fixed the value of the water to be supplied to the city at the amount of taxes levied by the city, and that the company accepted said valuation and it is bound by said acceptance.

That said ordinance No. 909 is contrary to acts No. 33 of 1887 and 56 of 1884 and the decree of the supreme court in said case of The City of New Orleans *vs.* New Orleans Water Works Co., and is in direct violation thereof, in this, that it ordains payment to the water works Co. of rates extortionately in excess of the amount fixed by the Legislature and accepted by said company under said section 11, act 33 of 1877, and the decree of the supreme court hereinbefore refered to, and actually amounting in the year 1885 to $68,340.00, while the taxes of said company *and* for that year are only $11,352.00.

That said act No. 56 of 1884 makes provision for the furnishing by the water works Co. of a supply of clear or filtered water to the city of New Orleans and purports to authorize the city to contract

for the same, whereas ordinance No. 909 and the alleged
62 contract based thereon make no provision at all for affording clear or filtered water to the city, and in point of fact that the New Orleans Water Works Co. has never furnished clear or filtered water to the city of New Orleans, and said alleged contract flagrantly violates the provisions of the act designated for the convenience, comfort, and health of the city of New Orleans, and is in fraud of its rights under the act, and is null and void; that under act No. 33 of 1877, E. S., or the charter of the New Orleans Water Works Company, section 2, it is provided that the city of New Orleans shall be allowed to use water from the pipes and plugs of said company, now laid or hereafter to be laid, free of any charge, and that it shall be the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter, and in consideration thereof the franchises and property of said New Orleans Water Works Company used in accordance with this act shall be exempted from taxation, State, municipal, and parochial, and that said ordinance No. 909, in providing for the payment by the city to the water works company for 1,139 hydrants and fire-wells at the rate of $60 per annum, amounting to over $68,000.00, is in violation thereof, as hereinbefore set forth, and that act No. 56 of 1884 did not diminish or impair the rights and advantages of the city under the terms and provisions of act No. 33 of 1887, E. S.

That the true meaning of said act No. 56 is that the city
63 of New Orleans, before it can demand taxes from the water works Co. in any year, shall make provision in the budget for the payment to said water works Co. of the amount due said company under and by virtue of its charter as interpreted by the supreme court for the water furnished in that year by said company, and that the value of the water mentioned in said section one does not signify a new value to be fixed by contract between the company and the city, but the value of the water as fixed in the charter of the company and as determined by the supreme court.

That the late city council was without authority in law and could not legally pass ordinance No. 909, and the late mayor of the city of New Orleans could not and did not bind the city in the matter claimed by said New Orleans Water Works Co. and as set forth in the alleged contract between the city and the water works Co., of date October 3rd, 1884, and that for greater certainty copies of said ordinance 909 and of the contract thereunder are annexed and made part of this answer.

That said alleged contract is not binding on the city of New Orleans, and that the water works Co., striving and contriving to obtain some unjust and unlawful advantage over the city of New Orleans and not satisfied with the terms and conditions of that charter, which is the law of the life of the water works Co., as determined by the supreme court, procured the Legislature at its session of 1884 to pass the act known as act 56 of 1884, which is entitled
64 "An act to provide for the supply of water to the city of New Orleans by the New Orleans Water Works Co. in cases of the

municipal taxation of said company; to authorize provision to be made for the payment of water supplied and to be supplied; to provide for obtaining a supply of clear or filtered water by the New Orleans Water Works Co., and to enable the city of New Orleans to contract for the same; to regulate the payment of taxes imposed on said company contrary to the exception given in its charter, and to put into effect section 11 of act No. 33 of acts of 1877, E. S., in instances of refusing or contrary to the exemption therein."

And that the water-works Co., under color of taking the benefit of the terms of said act 56 of 1884 and again striving and contriving to obtain some unjust and unlawful advantage over the city of New Orleans and not satisfied with the terms and conditions of its charter, procured the late council to pass ordinance No. 909 and the late city administration to enter into the alleged contract before Jos. D. Taylor, October 3rd, 1884, with said company under the ordinance hereinbefore referred to.

And the city of New Orleans further pleads that in case the court should decide that said act No. 56 of 1884 did authorize or enable the city and the New Orleans Water Works Company to enter into a new contract stipulating the value of the water to be supplied by said company to the city, all of which is expressly denied,
65 then and in that event that said act is unconstitutional, null and void, and of no effect, for this, to wit:

1st. That act No. 56 violates article 29 of the constitution of 1879, which declares that every law enacted by the General Assembly shall embrace but one object, whereas sections 1, 2, and 3 of said act 56 interpret and seek to enforce as one object section 11 of act No. 33 of 1877, E. S. Section 4 embraces as another and the second object this, to wit, "the authority to the city of New Orleans to contract for a supply of clear and filtered water," and section 5 embraces as another and a third object this, to wit, "that it reserves all its rights, franchises, and privileges to the water-works company."

2nd. The act 56 violates par. 13 of article 46 of said constitution; that the paragraph declares that the General Assembly shall not pass any local or special law on the following specified objects, creating corporations or amending, renewing, extending, or explaining the charters thereof, whereas sections 1, 2, and 3 of the said act do renew, extend, and explain the charter of the New Orleans Water Works Co.

3rd. The act 56 violates par. 14 of the same article, which paragraph provides that the General Assembly shall not pass any local or special law on the following specified objects, to wit, granting to any corporation, association, or individual any spe-
66 cial or exclusive right, privileges, or immunity, whereas sections 4 and 5 of the said act 56 do give to the water-works Co. the exclusive privilege to furnish clear and filtered water to the city of New Orleans and the inhabitants thereof.

4th. That act 56 violates article 57 of the constitution, which article declares that the General Assembly shall have no power to release or extinguish or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any

corporation or individual in this State or to any parish or municipal corporation therein, whereas said act does release and extinguish the indebtedness, liability, and obligation of the water-works Co. to furnish water free of charge to the city of New Orleans.

5th. That act 56 violates article 224 of the constitution, which declares that the General Assembly shall not remit the forfeiture of the charter of any corporation now existing, nor renew, alter, or amend the same, nor pass any general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution, whereas section 5th of said act 56 is a special law for the benefit of the water-works Co. and preserves its rights, franchises, and privileges and makes the same exclusive and monopolistic; and said article 56 further violates said constitution in said article; that said article of said constitution requires and exacts of corporations availing themselves of the benefit of the article
67 that they shall not invoke the same except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of the constitution, whereas there has been and there is no compliance whatever with said condition precedent on the part of the said water-works Co.

6th. That act 56 violates article 45 of the constitution, which declares that the General Assembly shall have no power to grant or to authorize any parish or municipal authority to grant any extra compensation free or allowance to a public officer, agent, servant, or contractor, nor pay nor authorize the payment of any claim against the State or any parish or municipality of the State under any agreement or contract made without express authority of law, and all such unauthorized agreements or contracts shall be null and void, whereas sections 1, 2, and 3 of said act 56 do authorize the city of New Orleans to grant extra compensation to the water-works Co. for claims of the company for water supplied and to be supplied to the city under the agreement and contract contained in section 11 of act No. 33 of 1877, obligating it to furnish water free of all charge to the city.

Wherefore respondent prays for leave of the court to file this supplemental answer, and to amend the original pleadings herein accordingly, and to join in the demand of plaintiffs herein; that the New Orleans Water Works Co. be cited according to law, and, after due proceedings, that there be judgment declaring ordinance No. 909, C. S., adopted by the late council of the city of New Or-
68 leans on the 23rd day of September, 1884, and signed and approved by the late mayor on the 26th day of September, 1884, and the alleged contract entered into before Jos. D. Taylor, notary, on the 3rd day of October, 1884, signed by J. V. Guillotte, late mayor, on behalf of the city of New Orleans, and Albert Baldwin, president, on behalf of the New Orleans Water Works Co., null, void, and of no effect and not binding in any manner on the city of New Orleans.

And providing the court should decide that said ordinance No. 909, C. S., and the said alleged contract of 23rd October to be au-

thorized by act No. 56 of 1884, then in that case that ordinance 909, C. S., and said so-called contract of October 3rd, 1884, be declared null and void and judgment be likewise rendered declaring said act 56 of 1884 to be null, void, and of no effect.

And this respondent prays for such further orders and relief in the premises as equity, law, and the nature of the case may require.

And respondent will ever pray, etc.

(Signed) W. B. SOMMERVILLE.
(Signed) CARLETON HUNT,
City Att'y.

N. O., November 2nd, 1888.

(*Order.*)

69 Let this amended and supplemental answer be filed as prayed for and the original pleadings herein amended accordingly.

New Orleans, November 2nd, 1888.

(Signed) F. A. MONROE, *Judge.*

Citation and sh'ff's return annexed.

Response of N. O. Water Works Company to Supplemental and Amended Answer of City of New Orleans. Filed November 14th, 1888.

Civil District Court for the Parish of Orleans.

EDWARD CONERY, Jr., *et al.*
vs.
THE CITY OF NEW ORLEANS and THE NEW ORLEANS WATER WORKS CO.
No. 15774, Division "C."

And now comes The New Orleans Water Works Company, defendant, by J. R. Beckwith, its attorney, and, by protestation, at all times protesting that the nondescript paper filed herein by its co-defendant, The City of New Orleans, on the 2nd day of November, 1888, styled "amended and supplemental answer," wherein it is prayed by the said city of New Orleans that this defendant be cited to answer and plead thereunto, is a form of pleading and proceeding entirely unknown to any system of law or pleadings and in all things unwarranted and illegal as produced, and that in law is of no import or avail, and that this defendant is not in law required to notice the same, yet at all times under the protest aforesaid, and to avoid any further delays in the prosecution of this cause to
70 final hearing, this defendant makes response to said citation issued thereon and saith that said nondescript paper and pleading ought not to be considered or allowed to remain any part of this record for the following reasons, amongst others:

1st. That if the same be taken and considered as an amended or supplemental answer of the city of New Orleans the same is in all things illegal and void, in that it is not consistent with the former

answer of the city of New Orleans, now and for a long time past made and on file in this cause, wherein the said city of New Orleans, by its said pleading and answer to the allegations of the plaintiffs herein, by unconditional denial of all and singular all of the alleged vices and allegations charged against the said contract assailed by the plaintiffs in this action, in all things affirm the same to be just, lawful, and in all things lawful and binding on the city of New Orleans by the most solemn form of judicial confession; that this defendant, The New Orleans Water Works Company, have acquired lawful vested right and property in said judicial confession, and the same cannot be impaired, avoided, or contradicted without the consent of the said defendant, The New Orleans Water Works Company, as is sought to be done in and by the said nondescript paper and alleged "amended and supplemental answer," and that the said defendant, The New Orleans Water Works Company, has never consented thereto and never will so consent, but in all things holds the city of New Orleans to observe decent commercial integrity
71 and good faith, in its dealings with this defendant, as well as to the observance of due and honest procedure herein.

2nd. That the said city of New Orleans, having in solemn form made and executed the contract assailed in the plaintiffs' petition, and having in this cause, by formal pleadings, reaffirmed the validity and lawful binding effect of said contract by formally, in a formal pleading by the city filed herein, *denied* all and singular all of the alleged nullities and pretended vices charged against said contract in the plaintiffs' petition, is in all things estopped in law from assailing the said contract for or by reason of any of the pretended nullities or vices set up in the plaintiffs' petition or in said pretended, amended, and supplemental answer, and is as well estopped in law from resorting to any pleading inconsistent with its original answer herein.

3rd. That the city of New Orleans is further estopped in law from the conduct illustrated by said alleged pleading because it has three-sevenths ($\frac{3}{7}$) of the direction of the affairs of the said New Orleans Water Works Co., and is in law and good conscience bound to deal with the shareholders so represented by the city of New Orleans with that decent regard for their rights demanded under all systems of law of those who control, manage, or direct the affairs of others of whom they are the trustees, and which at least directs that the trustee shall not actively assail the property over which they exercise a trust with intent to confiscate or destroy the same.

72 4th. That even if the pleadings and procedure of the said defendant, The City of New Orleans, was allowable in law in manner and form as the said defendant has pretended and proceeded herein, the same, in so far as the alleged substance of said pleading is concerned, is not permitted by law to be of any avail, for that a party to a contract cannot avoid his own solemn contract by even the most honest and disinterested confession of and setting up his own fraud, if fraud is the ground on which rescission is sought, as in the said pleading of the said city of New Orleans in question.

5th. That if it be permitted in law that the city of New Orleans,

as codefendant with this defendant, can set up against its codefendant any matter or thing in the form of pleading and proceeding resorted to herein by the said defendant, The City of New Orleans, and the city of New Orleans can in law stultify itself in its own pleadings in the same case, which is at all times denied them, this defendant avers that all and singular all of the averments of law and fact in said alleged amended and supplemental answer of the city of New Orleans are not sufficient in law to entitle the city of New Orleans to the relief prayed for, nor can the same be lawfully granted in this cause or in any other action setting up the same pretended law and alleged facts; that the same are not good in law or commendable as example.

6th. This defendant, at all times protesting as aforesaid for the reasons aforesaid the irregularity and nullity of the said
73 amended and supplemental answer of its codefendant, The City of New Orleans, in question, and at all times insisting that the same is a nullity in law and void in procedure, because it has been by the process of this court called upon to answer the same in the event that the said objections and exception hereinbefore set forth be held insufficient in law and not well taken, and not otherwise, for answer thereto denies all and singular the matters set forth in said alleged "alleged and supplemental answer," in order that there may be no delay in the final determination of this cause, and prays that the same may be adjudged not only improperly pleaded and set up in this cause and in all things insufficient in law to entitle the said codefendant, The City of New Orleans, to any relief as prayed for against this its codefendant, but that the said city of New Orleans may be condemned to pay all costs that may result therefrom, and will ever pray, etc.

(Signed) J. R. BECKWITH,
Att'y for Def't, N. O. Water Works Co.

Testimony and Note of Evidence for Plaintiffs, Taken in Open Court on January 2nd, 3rd, 7th, 9th, and 10th, 1889. Filed January 15th, 1889.

E. CONERY, Jr., *et als.*
vs.
N. O. WATER WORKS CO. *et als.* } No. 15774, Div. "C."

Civil District Court.

Note of evidence for plaintiffs.

Plaintiffs offer, produce, and file in evidence act No. 33 of
74 the extra session of the Legislature of the State of Louisiana of the year 1877.

Counsel for The New Orleans Water Works Co., defendant, object to the introduction of any evidence for and in behalf of E. Conery, Jr., *et als.*, the tax-payers and original plaintiffs herein, for the reason that they are but members of the corporation aggregate, the city

of New Orleans, and that the city of New Orleans has, since the last continuance and prior to the case being called for trial, by a formal pleading accompanied by citation, joined the plaintiffs and asked by formal petition, termed the supplemental answer and of record, the annullment and rescission of the contract sued on and the same relief, and demanded by the citizens on its own account and in its own pleadings, and has thereby become the party plaintiff in the case, and that the reason no longer exists for the action on the part of the citizens directed to the annullment and rescission of the contract sued on or any of the relief asked.

End of the first day.

JANUARY 3RD, 1889.

Note of Evidence for Plaintiffs, Taken in Open Court before the Hon. F. A. Monroe, Judge.

By the COURT:

The immediate question before the court is the objection on behalf of the defendant company, The New Orleans Water Works
75 Co., to the introduction of evidence in behalf of the original plaintiffs in the case, E. Conery, Jr., *et als.* That objection is predicated upon the proposition that E. Conery, Jr., *et als*, the citizens who instituted this suit to set aside the contract between the city of New Orleans and the New Orleans Water Works Company, were ousted from this suit, and, if not, that their position of plaintiffs was completely absorbed by The City of New Orleans, one of the codefendants, which had changed front, and which, having filed a general denial to the petition brought by E. Conery, Jr., *et als.*, had subsequently come into court by amended pleadings, an amended answer, and constituted itself not coplaintiff but the entire plaintiff in the case, absorbing the citizens, Conery *et als.*, who are merely molecular parts of the corporation.

That was the proposition upon which the objection was based—that Conery *et als.* were only parts of the corporation—and as long as the corporation has come into court itself Conery *et als.* had fallen over and The City of New Orleans was now the plaintiff in the case. I thought it was necessary to hear some discussion as to what effect that state of the case by this amended pleading of the city of New Orleans was, because it was upon that proposition I had to predicate my rulings. It was impossible for me to rule upon the objection predicated upon that proposition unless I had heard some discussion as to whether the city had a right to file that amended pleading, and, if it had any right in the premises at all, what effect the filing of that amended pleading had upon the rights of the
76 parties originally plaintiffs in the case.

Now, the discussion of that question involves necessarily discussion as to the attitude of the defendant, The New Orleans Water Works Co., with respect to that amended pleading. The water-works Co. state, in answer to that amended pleading, You have got no right to become plaintiff, because you were originally defendant denying, and you cannot turn a somersault and become plaintiff affirming what you originally denied. The water-works

Co. therefore filed a written exception, saying: "You are not and in law cannot become plaintiff in this case. You are where you first placed yourself, and you have got to stay there." On the objection to the introduction of evidence the proposition was that the city had changed its position; that, in effect, it had not remained where it had originally started, but had changed its position.

There are the two horns of the dilemma between which ruling had to be made.

Now, the discussion has covered the whole subject. We have heard the city of New Orleans on its right to amend its pleadings in this way, the original plaintiff has spoken, and the whole question is therefore before the court. It seems to me, to make the matter short, that the views expressed by counsel for the original
77 plaintiffs in the case are the rules which ought to govern—in other words, the immediate question before the court is whether the evidence should be admitted or not, and that question is to be determined by the decision of this question, whether in the position of this case the city of New Orleans has the right so to amend its pleadings as to absorb the original plaintiffs in the case and oust them from their position as plaintiffs. I don't think the city of New Orleans has any such right; I don't think the amended pleadings which are in the record ought to be held to have any such effect as that. As to the question of estoppel and as to how far the city is estopped by its pleadings in this case, it is perhaps not absolutely necessary that I should go. The question of estoppel, whether estoppel in — or estoppel by judicial admission or estoppel by judicial denial, is one which it appears to me, so far as the jurisprudence is concerned, has been governed by the conditions of particular cases. It certainly appears to me that it would endanger the integrity of all proceedings in courts judicial if anybody, a municipal corporation acting through its counsel or a minor acting through his tutor, or anybody else coming in a court in a particular case, could to-day set up one state of facts, take one position as a matter of fact or law, and could be permitted on the plea of minority to come in to-morrow in the same case and file pleadings directly opposite and at variance with the pleadings filed before. But whether that is the precise position upon which this ruling is based, or
78 whether it is based on the articles of the code of practice, which say that no party to a suit can amend his pleadings when the effect would be to change the issue, is immaterial. Counsel has correctly remarked that motions to strike out pleadings are not regarded with favor; the better practice is to object to testimony, and the objection comes up in that way. My opinion is that the amended pleadings filed by the city of New Orleans ought to stand in so far as it is an admission in favor of the original plaintiffs in the case. The original plaintiffs charged that the city had made a contract *ultra vires*. The city denied it. The original plaintiffs charged that the contract was tainted with fraud. The city denied that. The city now comes in the court and says the contract was *ultra vires*, was tainted with fraud. From denying it I now come in and affirm it. I say the city has a right to do that, just as anybody

has a right to come in at any time and confess a state of facts. In view of the conclusions which I have reached, I don't think the city has affected the position of the original plaintiffs. The objections are overruled.

To which ruling of the court counsel for the New Orleans Water Works Co. excepts and reserves this note in lieu of a bill of exceptions.

It is agreed between counsel for the plaintiffs and the New Orleans Water Works Co. that in order to prevent the making of objections to each piece of testimony as it is offered, and reserving a separate bill of exceptions, that all of the testimony, documents, acts of the Legislature, and evidence of every kind and nature which may be introduced or tendered by the plaintiffs in this case are considered as coming under the above objections of the water-works Co. and such other objections as may hereafter be specially designated as to each piece of testimony; that the court overrules the objections above made, and the water-works Co. reserves its bill of exceptions to the ruling of the court the same as if the objections were made and the bill reserved at each specific offer.

79

It is further agreed that none of the acts of the Legislature which may be offered in evidence by any of the parties to this case shall be copied into the transcript in case of appeal, but shall be referred to in the printed acts as part of the record.

Plaintiffs next offer, produce, and file in evidence act 43 of the acts of the Legislature of the State of Louisiana for the year 1878; also act 56 of the acts of the Legislature for the year 1884; also copies of the New Orleans Daily States, of date April 30th, 1884, and for each of the 31 days in the month of May, 1884, and especially the advertisement in said papers couched in this language:

"Notice is hereby given of the intention to apply to the General Assembly for an act or law to regulate the use by the people and municipalities or political corporations, for public purposes or purposes of public institutions, of water pumped by or obtained from water-works companies; to establish police supervision and rules relative thereto, and fix the conditions under which said water shall be taken, used, or supplied within the territorial limits of any municipality or corporation, whether supplied to the corporation or the people thereof.

(Signed) N. O. WATER WORKS CO."

80

Counsel for the New Orleans Water Works Company objects to the evidence offered, on the ground that the conditions precedent to setting the Legislature in motion, the motives or acts of the promoters of an act of the Legislature, or the motives of the legislators composing the Legislature passing the act, if the Legislature have the right to legislate upon the subject, are not and cannot be inquired into to give effect, increase, limit, or in any way affect the validity of an act or its effect for that reason; 2nd, on the ground that it is immaterial.

End of second day.

JANUARY 7TH, 1889.

The court having adjourned at the last sitting after the counsel for the plaintiff had closed his argument on the objections propounded by the water-works Co., with the file of the Daily States and the advertisement therein contained, now, at the opening of the trial of this case, on this 7th day of January, 1889, the defendant, The Water Works Co., moves the court to allow it to recast the objections already made and to state additional objections to the testimony, as follows:

81 The defendant, The New Orleans Water Works Co., objects to the evidence offered by counsel for the alleged tax-payers—

1st. Because it is irrelevant and immaterial, and does not tend to prove any lawfully issuable matter set up in the petition.

2nd. Because the said plaintiffs have averred in their petition that act 56 is absolutely null and void and of no effect in law for reasons declared to be apparent on the face thereof, and under such averment it is immaterial, as far as these particular plaintiffs are concerned, how or by whom the alleged act was formulated, or who promoted the action, or what motives governed or influenced the Legislature in voting for or adopting the alleged act.

3rd. If the Legislature had the constitutional right under any circumstances or in any form to legislate upon the subject-matter, or matters connected with said statute No. 56 of the acts of 1884, the validity of said statute cannot be assailed or its effect or obligation questioned or impaired by any inquiry into the question of who suggested or promoted the action of the Legislature or who favored its adoption, or by any offer or attempt to show that its passage was procured even by fraud or conspiracy, either between or amongst the members of the Legislature or between those alleged to have favored the passage of the act, and any of the members of the Legislature who favored or voted for its adoption.

82 4th. If said act 56 of the acts of 1884, to which it is averred said evidence relates, is on its face valid and a competent exercise of power by the Legislature, and is mandatory in character, neither the wisdom or integrity of the Legislature can be impeached in any judicial proceedings by inquiry into either the intelligence or integrity of the Legislature, or by proof tending to show that the Legislature acted with want of intelligence or in fraud or in the aid of any alleged fraudulent uses of the statute made after its adoption.

5th. If the act is simply permissive or enabling in character, not only does the same rule apply, but the adoption of the act could not in law be an act of fraud by the Legislature, or by any person encouraging the adoption of the act, as in law the act could not under any circumstances be the means or instrument of fraud or be used in fraud in point of time until after its adoption and promulgation as a statute.

6th. That if the proof is sought to be introduced to effect the question of whether the defendant company has been subjected thereby to the provisions of the Constitution of 1879 relating to monoplies, the question is in no manner involved or triable in this action, and

upon that question the defendant can only be called to respond by the State itself moving in proper form of action and procedure.

83 7th. That if the evidence is sought to be introduced as tending to show that the contract sought to be annulled in this action was entered into by fraud or procured by fraud perpetrated by either or both of the parties to the contract, it is inadmissible under the pleadings and record of the suit as it stands, not only because the plaintiffs, Conery *et als.*, by their own averment stand on the record in no other capacity than as several members of a corporation, aggregate and political, and both in law and fact are privies of and with the city of New Orleans as a corporation and subordinate in power, capacity, and authority thereto, and are therefore *quo ad* all pretended frauds alleged against said contract estopped concerning said alleged frauds, not only by its inability to set up its own fraud or frauds in which it participated against the validity and binding effect of its own contracts, but because by its answer of record in this case filed and made in response to all of the alleged vices and frauds charged against the contract has, with notice of all of the contents of plaintiffs' petition, not only solemnly denied all of said pretended frauds, but has in the most formal manner, after all of said alleged frauds had been charged against the contract and the parties thereto, affirmed said contract to be free from vice and fraud and in all things legal and binding on the city, the original plaintiffs, Conery *et als.*, being privies to the said act of the city and bound thereby to the full extent that the city itself is bound and estopped to the same extent that the city itself is estopped; which recasting and additions of objections in the form and manner and words above stated the court allowed the defendant to make.

84 To which ruling of the court the plaintiffs except and reserve this note in lieu of a bill of exceptions. The City of New Orleans joins in said exception and bill of the plaintiffs.

The court overrules the objections to the introduction of evidence by the plaintiffs.

To which ruling of the court counsel for defendant except and reserve this note in lieu of a bill of exceptions.

It is agreed between counsel for the plaintiffs and the New Orleans Water Works Co. that in view of the fact that the file of the Daily States offered in evidence is the property of the newspaper that therefore papers above offered shall not be filed in evidence; but it is admitted, subject entirely to the objections, ruling of the court, exception, and bill aforesaid, that there does appear in the New Orleans Daily States from April 30th to the 31st of May, inclusive, an advertisement of the purport above written and stated, and this agreement is to stand in lieu of the production of the papers themselves if admitted in evidence by the court.

It is further agreed that, without formal announcement of the above objections and reserving of special bills of exceptions as to each offering of testimony, all of the evidence and testimony to be herein adduced by the plaintiffs is to be subject to the above special objections, exception, and bill, and that the defendant, The New Or-

leans Water Works Co., is to be considered as having a bill of exceptions in due form of law to the admission of all of said testimony and evidence.

85 It is admitted that plaintiffs in the original petition are citizens of the State of Louisiana and city of New Orleans, and that they are property tax-payers of the city of New Orleans to the amount averred in the original petition.

Plaintiffs next offer, produce, and file in evidence record No. 3617 of the civil district court for the parish of Orleans, styled City of New Orleans *vs.* New Orleans Water Works Co., including in this offer the petition, answer, reconventional demand, testimony adduced, documents filed, the judgment of court, the order of appeal, and the mandate of the supreme court of the State.

It is agreed that in case this case goes to the supreme court on appeal that the record of appeal in this case in that court, being record No. 9007 on the docket of said court, shall be used as part of the record of appeal without necessitating the copying of the record of the civil district court into the transcript of appeal.

Counsel for defendant, The New Orleans Water Works Company, object to the introduction of said record in evidence on the ground that it relates to a special controversy in 1881 relative to taxes for 1881, and covers and concludes no one for and during any of the period covered by the controversy in this case.

The court overrules the objection; to which ruling of the court counsel for defendant except and make this note their bill of exceptions.

86 E. A. LUMINAIS, being duly sworn as witness for plaintiffs, testified as follows:

Direct examination by Mr. FARRAR:

Q. Who is clerk of the civil district court for the parish of Orleans?

A. I am.

Q. Who is custodian of its records?

A. I have.

Q. Have you examined the records for case No. 1406 and case No. 1591, styled City of New Orleans *vs.* New Orleans Water Works Co. on the tax docket of the city for the years 1880 and 1882?

A. Yes, sir.

Q. Where are those records?

A. They are missing, sir; all the other records are there except those two.

By the COURT:

Q. Did you find any receipt anywhere for them?

A. No, sir. Mrs. Saucier is now looking, but she is under the impression that those records have not been handled since a year.

It is admitted that there appears to be no receipt or record in the clerk's office of the civil district court for the two records, Nos. 1406 and 1591, above referred to.

It is admitted that on January 11th, 1886, the New Orleans
87 Waters Works Co. obtained a writ of error to the Supreme Court of the United States from the decision of the supreme court of Louisiana in case No. 9007, before offered in evidence, as appears by the writ of error lodged in this cause; that that writ was prosecuted, and that the case is now pending on said writ of error in the Supreme Court of the United States, not reached on its docket.

Plaintiffs next offer, produce, and file in evidence the statement of taxes paid by the New Orleans Water Works Co. to the city of New Orleans for the years 1885, 1886, '87, and 1888, being a certified certificate transcribed from the books of the water-works Co. and signed by R. L. McMurdo, secretary, marked "A A."

It is admitted that the amount stated in said certificate above mentioned is the full amount of taxes assessed against the N. O. Water Works Co. by the city of New Orleans for the years 1885, '86, '87, '88.

Plaintiffs next offer, produce, and file in evidence a certified statement from the books of the N. O. Water Works Co. of the amounts received from the city of New Orleans for the years 1885, '86, '87, '88 under the contract attached in this case, marked "B."

It is agreed that the budgets of the city of New Orleans for the years 1885, '86, '87, '88, '89 shall be read in evidence by the parties in this case as public documents without any formal offering
88 of same in this court and in the Supreme Court and without copying same in the transcript in case of appeal.

Plaintiffs next offer, produce, and file in evidence a certified copy from the books of the N. O. Water Works Company of the minutes of a special meeting held on September 27th, 1884, marked "C;" also certified copy of minutes of a called meeting held Tuesday, November 11th, 1884, marked "C 1."

Plaintiffs next offer, produce, and file in evidence document marked "D," which contains, first, a certified copy of a bill of the New Orleans Daily States, paid May 5th, 1884, for advertising; 2nd, a certified copy of a receipt, dated November 14th, 1884, of Samuel P. Blanc for twenty-five hundred dollars; 3rd, a certified copy of a receipt, signed May 28th, 1885, of Samuel P. Blanc for twenty-five hundred dollars.

Plaintiffs next offer, produce, and file in evidence document marked "E," which is a blank form of a bill of complaint styled New Orleans Water Works Co.

It is admitted that during the years 1886 and 1887 the New Orleans Water Works Co. filed in the circuit court of the United States in and for the fifth circuit and eastern district of Louisiana, at New Orleans, bills of complaint, of which this pamphlet contains
89 the substantial allegations, the blanks therein being filled with the names of the proper parties, against a number of persons and corporations in the city of New Orleans, to wit, the American Fatty-Products Manufacturing Co., the Maginnis Oil and Soap Works, the Louisville & Nashville Railroad Co., the People's Ice Co., Louis Roux, and others. All of these cases mentioned above

are pending and undetermined upon the docket of said court, except the case of the Maginnis Oil and Soap Works, which is on appeal in the United States Supreme Court from a decree rendered on a division of opinion between the judges, the presiding judge having decided adversely to the water-works Co., and Judge Billings, the district judge, having decided in favor of the water-works Co. It is agreed that this offer is made subject to all the objections and exceptions and rights of bill reserved set forth above and to the further objection of immateriality or irrelevancy.

In case of appeal by either party in this case it is agreed that the printed pamphlet marked "E," just offered by plaintiffs, shall be attached to the transcript in the original and shall not be copied therein.

Plaintiffs next offer, produce, and file in evidence a certified copy of a notarial act passed before Jos. D. Taylor, notary, on the 3rd of October, 1884, by and between the city of New Orleans and the New Orleans Water Works Co., marked "F."

90 It is further agreed that ordinance 909, which purports to be set forth in full in said notarial act marked "F," before offered, is correctly set forth in said notarial act.

It is further agreed that said ordinance 909, C. S., as set forth in said notarial act marked "F," may be used by all the parties to this case, both in this court and in the Supreme Court in case of appeal.

WILLIAM GOLDING, being duly sworn as a witness for plaintiff, testified as follows:

Direct examination by Mr. FARRAR:

Q. What is your profession?

A. Engineer.

Q. Have you ever had any professional connection with the New Orleans Water Works Co.?

A. Yes, sir.

Q. What was that connection?

A. I was consulting engineer for three or four years.

Q. From what time to what time?

A. From the latter part of 1882 until June, 1886, I believe.

Q. What were your duties in that capacity?

A. I was consulting engineer, but of course I made it my business to know pretty much all that was going on in connection with the works. My duty as consulting engineer was of

91 course to assist and render such advice as they required in that line, and I made it a part of my business to visit the works as frequently as I found it convenient and necessary to properly discharge that duty.

Q. How long have you known the property known as the New Orleans water works—the property and pumping station?

A. I have very carefully watched the New Orleans water-works affairs and machinery since 1860.

Q. Have you had personal knowledge of those works since 186–?

A. Yes, sir.

Q. Will you state to the court the system in vogue in 1882 of pumping by day and by night or the system in vogue in 1882 of supplying the city of New Orleans with water by day and by night?

Defendant objects to this testimony or any answer responsive to the question asked as immaterial and irrelevant to any issue in this case and entirely disconnected with the question of fraud or any averment in plaintiffs' petition.

The court overrules the objection.

To which ruling of the court counsel for defendant except and reserve this note in lieu of a bill of exception.

92 A. The system was to carry pressure in the mains from six o'clock in the morning until six o'clock in the evening, and then the pressure was allowed to fall to what is called basin pressure, which is about twenty-eight feet. There were two runs during the night—from six until nine and from three to six—when the valve was opened and the water went into the basin. During those hours the pressure was maintained at thirty feet, and during *for* twelve hours a pressure of sixty feet was maintained. That was the custom in 1882.

Q. What was the custom in 1860?

A. Precisely the same method of operating the works in 1860. There has never been any departure from that custom, to my knowledge.

Q. What was the method in 1886?

A. Precisely the same—no departure.

Q. In 1885?

A. Precisely the same.

Q. In 1884?

A. Precisely the same.

Q. And in 1888—do you know the situation now?

A. I don't think I have been in the works for two years, but from outside evidence there appears to have been no change—no departure.

Q. Have the water-works company during the years 1884, '85, and '86 or since that date made any additions or changes in the system used by them or in the services performed by them to supply the city of New Orleans with water?

Same objections as heretofore are made now by counsel for defendants, same ruling by the court, and same bill reserved.

93 A. There has been no departure.

Q. Have they put in any new pumping apparatus since 1860?

A. No.

Q. The engines and pumps there now—when were they put there?

A. The engines and pumps, as they are operating the works now, in 1860. New boilers have been put in at different times, but the pumping engines and pumps have had nothing more done to them than necessary for maintenance.

Q. Have they added another pump?

A. There is an auxiliary pump across the street, but it is never used except once a month, maybe, to keep it in pumping condition. The demand for water is not as great now as it was in 1860, not by a great deal, and consequently the small pumps that were considered in 1860 somewhat limited are now adequate for all demands, and the comparatively large pumps put in — 1860 is not being used at all. In other words, the works are just as they were in 1860—no change.

Q. Does the water-works Co. or did it during the years when you were connected with it, in 1884, '85, and '86, keep its pumps going, pumping into the main from 9 o'clock at night until 6 in the morning?

A. No, sir. They stop at 9 and start again at 3. They may change for half an hour or so, but that was the intention.

Q. They pump in the mains from 6 until six in the day?

A. Yes, sir.

Q. And from six until nine at night they pump into the reservoir?

A. Yes, sir.

94 Q. And from three until six in the morning the same?

A. Yes, sir; the system of pumping is the same, except that the valve is open which allows the surplus to run into the reservoir.

Q. Then the only supply the city has from nine until three in the morning is the pressure from the head of water deposited in these basins?

A. Yes, sir; that is the way it has been done since 1860. As to the time before that, I don't know, but I think for years before the practice was the same.

Q. Do you know Mr. James D. Houston?

A. Yes, sir.

Q. What was his connection with the water-works Co. during the year 1884?

A. I think until 1885 he was superintendent of the works.

Q. What were his duties as superintendent?

A. Well, he was responsible for everything—adjust grievances in regard to excessive charges for water; give directions about the works; was consulted about all contracts and things going on, and attended to everything necessary as superintendent.

Q. What is the character of the water furnished to the city of — Orleans—I mean to say is it ordinary river water or clear and filtered water?

A. It is the water as taken from the Mississippi river; it passes through no process of filtration, but right into distribution.

Q. What was the system in 1860?

95 A. The same.

Q. In 1884?

A. The same.

Q. 1881?

A. The same.

Q. Now, at the present time?

A. The same.

Q. In other words, they pump it directly from the river into the mains and into the reservoir, from whence it is distributed in the city?

A. Yes, sir.

Q. Has there been any change in the organization, constitution, and functions of the works from 1860 until this time?

A. No, sir.

No cross-examination. End of third day.

JANUARY 9TH, 1889.

Plaintiffs next offer, produce, and file in evidence the printed annual reports of the New Orleans Water Works Co. for the years 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, and 1888.

It is agreed that in case this goes to the Supreme Court on appeal the ten printed documents above offered in evidence shall not be copied into the transcript, but shall be annexed to the transcript in the original.

96 L. H. GARDNER, being duly sworn as a witness for plaintiffs, testified as follows:

Direct examination by Mr. FARRAR:

Q. What is your present connection with the N. O. Water Works Co.?

A. Superintendent.

Q. How long have you been superintendent?

A. Since September, 1884, I think.

Q. Who was superintendent prior to you?

A. James D. Houston.

Q. How long was he nominally superintendent?

A. From July, 1882, to September, 1884.

Q. Was he during that time a member of the board of directors?

A. He was.

Q. How much stock in the New Orleans Water Works Co. did Mr. James D. Houston during that time own?

A. He owned at one time, as nearly as I can recall it, over three thousand shares of stock. I can't answer more accurately than that.

Q. He owned over three thousand shares?

A. Yes, sir; at one time.

Q. What was that time when he owned over three thousand shares?

A. It was in the years, I think, of 1882 and 1883.

Q. What were Mr. Houston's duties as superintendent, or as nominal superintendent, during the years from July, 1882, until

97 September, 1884?

A. Looking after the details of the working of the company—seeing that the employees did their duty and such other duties as the name superintendent would imply.

Q. There has been offered in evidence in this case an advertisement, signed New Orleans Water Works Co., published in the New

Orleans Daily States from April 30th to May 31st, 1884. Who delivered that advertisement to the States for insertion?

A. I did.

Q. What was your position in the New Orleans Water Works Co. at that time?

A. Secretary.

Q. And treasurer?

A. Yes, sir.

Q. In whose handwriting was that advertisement?

A. As nearly as I can remember, it was in the handwriting of Mr. Samuel P. Blanc.

Cross-examination by Mr. BECKWITH:

Q. Who was Mr. Samuel P. Blanc? He is now dead, is he not?

A. He is dead. He was an attorney-at-law.

Q. Was he at that time the general counsel for the company?

A. He was not.

Q. Will you state all the circumstances in relation to your obtaining this advertisement and the delivery of it to the New Orleans Daily States, if you now remember them?

A. Mr. Blanc had informed me that Mr. Houston had employed him to draw up an act to be presented before the Legislature.
98 Subsequently to that, in his office, as near as I can remember, he handed me this notice, saying that it was necessary that notice of this act should be made. I took it and read it and, as near as I now remember, went back to the office with the intention of sending it to the Daily States or taking it there myself. I then went back to Mr. Blanc's office and asked him if it should not be signed. He said he thought it was immaterial, but it would be just as well to sign it. Said I, "How?" Said he, "New Orleans Water Works Co. will answer." I then signed it and either took it or sent it to the Daily States for publication.

Q. At the time that Mr. Blanc handed you that notice had you seen or did you know of any draft of a proposed act of the Legislature to which this notice might refer?

A. He had previously told me that Mr. Houston had employed him to draft such an act.

Q. I asked if you had at that time seen the draft of the act.

A. I don't think I had. I don't recall having seen it.

Q. What relation, if any, did Mr. Blanc as an attorney hold to Mr. Houston at that time, if you know?

A. I don't know.

Q. Did you get any direction relative to the publication of this notice prior to its publication from anybody but from Mr. Blanc?

A. I did not.

Q. Was the matter of the proposed adoption of this act, or of any act to which this notice might apply, or the matter of
99 publishing the notice ever dealt with in any manner by the board of directors of the New Orleans Water Works Co.?

A. It was not.

Q. Did you prior to its publication or during its publication ever receive any directions about or concerning the publication from any one connected with the company except Mr. Blanc?

A. I did not.

Q. Do you know or do you remember anything about or concerning the payment of the bills of the Daily States for publications of that notice?

A. I do.

Q. What do you know?

A. I know the bill was presented for payment to the New Orleans Water Works Co. and I paid it.

Q. What position in relation to the company did you hold at the time of payment?

A. Secretary and treasurer.

Q. Did you receive any direction from any one connected with the company as a director, officer, or from the superintendent concerning that bill or its payment?

A. I did not. I paid it upon my own motion, believing it to be a matter of water-works interest. I paid it in connection with other bills.

Q. The bill was presented as an item in a general bill for publication, was it not?

A. Yes, sir.

Q. Were the other items in relation to company matters?

100 A. Yes, sir.

Q. Now, was the question of the obligation of the company to pay for this advertisement or the propriety of your paying it ever acted upon by the board of directors of the water-works Co.?

A. It was not; nor was it ever known to the board of directors or to any one of them as far as I know until this suit was instituted. My books as secretary and treasurer of the company were not examined by the finance committee during the whole time of my office as secretary and treasurer.

By the COURT:

Q. Who was president of the company at that time?

A. Mr. Albert Baldwin.

Q. Was he aware of the fact of the publication of this notice?

A. I don't know. I never consulted him about it. He saw it in the public prints, perhaps.

Q. You had no conversation with him on the subject at the time?

A. Not that I remember.

Q. What was the whole number of shares of the capital stock at that time?

A. Twenty thousand was the total, of which the city owns about one-fifth.

By Mr. FARRAR:

Q. Who prepared act No. 56 of the acts of the Legislature of the

year 1884, known as the act relative to the relations between
101 the New Orleans Water Works Co. and the city of New Orleans?

A. Speaking accurately and of my own knowledge, I don't know.

Q. Don't you know that Samuel P. Blanc did?

A. I believe that he did.

Q. Who drew up ordinance 909, C. S.?

A. Samuel P. Blanc.

By Mr. BECKWITH:

Q. Do you know that Samuel P. Blanc drew up ordinance 909, C. S., in the form in which it was adopted by the council or whether his draft of that ordinance 909 was adopted without amendment?

A. It was amended in the committee, the special committee raised by the council to enter into the contract with the company. Whether it was amended by the council or adopted as offered by the committee I don't now remember.

Q. Do you know whether Mr. Blanc drafted the amendments to that ordinance?

A. He did not.

Q. Do you know at whose suggestion the committee amendments were made—whether they were made by Mr. Blanc or by members of the committee?

A. They were suggested by several members of the committee. Mr. Garidel was one of the members of the committee. He suggested one amendment, and several other members of the committee also made amendments.

Q. Then the ordinance as passed was not the original draft by Mr. Blanc?

102 A. No, sir.

By Mr. FARRAR:

Q. Don't you know from your contract with the officers and directors and the stockholders of the New Orleans Water Works Co. that they were fully aware of what was going on in the Legislature in 1884 relative to this act 56?

A. Emphatically I do not.

Q. Do you mean to say you had no conversation with any of those officials?

A. None that I now recall.

Q. Who were the directors in 1884 representing the stockholders?

A. Albert Baldwin, James D. Houston. I thought I could give it to you exactly from the annual report which I have in my hand of that year, but I find that it is not on here; but Mr. Albert Baldwin and James D. Houston were directors in 1884. Who the other two were I am not now able accurately to state.

JAMES D. HOUSTON, being duly sworn as a witness for plaintiffs, testified as follows:

Direct examination by Mr. FARRAR:

Q. Mr. Houston, did you have any official connection with the New Orleans Water Works Company in 1884?

A. I had.

Q. What was it?

103 A. I was director and superintendent, I think. I am not positive.

Q. Do you know who wrote and prepared act 56 of 1884?

A. Samuel P. Blanc; at least they were sent to me by him and were in his handwriting. I took it for granted that he had prepared them.

Q. Do you know what senator or member of the house of representatives introduced that act in the Legislature?

A. I can't recall just at this moment, but my impression is that Senator Breaux introduced it.

Q. At whose request?

A. Mine.

Cross-examination by Mr. BECKWITH:

Q. Will you state, Mr. Houston, what relation Mr. Samuel P. Blanc held to the New Orleans Water Works Co. at the time he prepared this act?

A. None whatever, sir; Mr. Samuel P. Blanc was employed by me as an individual to appear and assist Judge Voorhies in the management of the case of The City of New Orleans *vs.* The Water Works Co. for taxes. Mr. Blanc had in his possession a memorandum in which it was distinctly stated that he appeared for me as an individual, and I in no way bound the company to pay him any fee whatsoever, nor was the company bound in any manner whatsoever for his fee.

Counsel for plaintiffs object to the witness stating the con-
104 tents of a memorandum until it has been shown that the same has been lost, and move the court to strike out the witness' answer given above.

The court grants the motion.

To which ruling of the court counsel for defendant except and reserve this note in lieu of a bill of exceptions, making the said answer a part hereof.

By Mr. BECKWITH:

Q. Will you state, Mr. Houston, the history of this act No. 56 of the acts of the Legislature of 1884, its presentation to the Legislature, and your connection with it, with as much detail as you can remember?

A. When the case of The City of New Orleans *vs.* The Water Works Co. for taxes was tried I was the owner of four thousand three hundred and twenty shares of the stock of the water-works Co., over one-fifth of the entire capital stock of that company. The effect of

the decision of the supreme court in that case was very injurious to the stock—that is, as regards its price. There was a combination formed on Carondelet street with an object to force me out—to make the burden too heavy for me to carry and force me to drop my stock and they buy it in for almost nothing. I tried to devise some means to cause a reaction in favor of the stock, to hold up its value, and I conceived the idea of applying to the Legislature for this act. I went to Mr. Blanc and had him to draw up the act. He and I together went over the provisions of it and he agreed to draw
105 it up for me. He went away, went North without drawing up the act, but he sent the act to me by mail. Before his departure he drew up this notice of the application for the act, and I forwarded the notice, my recollection is, from Baton Rouge to Mr. Gardiner, asking him to have it published for me. I didn't sign it for the New Orleans Water Works Co. No signature was necessary in giving such a notice, at all. I afterwards saw it was signed and asked Mr. Gardiner why it had been signed.

I do not now remember what his answer was. I had the act introduced and I submitted the act to several lawyers to know whether it was constitutional or not. I was told that it was, and among those who told me so was my friend Mr. Farrar. I asked him if the act was constitutional and he told me it was. I did not at that time believe the act would pass. My object in making the attempt was to tide over and prevent a break in the market. The act was passed and I then got Mr. Blanc to draw up the ordinance. The ordinance was passed by the city council and I prevailed upon the board of directors to accept the ordinance, which they did do.

Q. Now, what, if anything, did the New Orleans Water Works Co. have to do with promoting that act or getting it through both houses of the Legislature?

A. Nothing whatever. I ought to state now that I know it appears strange that I should employ Mr. Blanc in that way, but that was not the first time I employed an outside attorney. I employed Mr. Beckwith also as an individual, and our agreement was that the company was not responsible for his fee. The case was The
106 City of New Orleans *versus* John A. Morris, The New Orleans Water Works Co., and others. As I have said, I was at that time the largest stockholder in the company and took such steps as I thought necessary to protect my own interest.

Q. Did the New Orleans Water Works Company as a company expend any money or employ any lobby or representatives endeavoring to pass this act thro'gh the Legislature?

A. Not a dollar, nor did I either. I didn't find it necessary.

Q. Do you believe that you know all of the instrumentalities that were used to induce the Legislature to pass that act?

A. I think I do.

Q. Well, sir, was there any fraudulent device or corruption resorted to?

A. None whatever.

Q. Now, how long did your relation with the company as an

officer or director in it continue after the adoption and promulgation of act 56 of 1884?

A. It continued up to January or February last year.

Q. Was there ever any meeting of the stockholders of the New Orleans Water Works Co. called for the purpose of voting upon or considering the question whether they would accept this act 56?

Counsel for plaintiffs objects to this question; whereupon Mr. Beckwith states that he withdraws same for the present.

By Mr. FARRAR:

Q. Did Mr. Samuel P. Blanc ever present you a bill for
107 professional services in connection with the drawing up of this act and the drawing up of this ordinance?

A. He did not.

Q. Did you ever pay him individually for his services in drawing up this act and in drawing up this ordinance?

A. I did not.

Q. You spoke of having employed Mr. Beckwith upon one occasion in the case of The City of New Orleans *vs.* John A. Morris and others individually to represent you?

A. Yes, sir.

Q. It is not a fact that the water-works Co. subsequently paid Mr. Beckwith's fee in that case?

A. I paid Mr. Beckwith's fee in that case individually, and subsequently the water-works Co., through its board of directors, determined that I should not have been put to that expense and they returned me my money.

Q. The water-works Co., as appears by the resolutions offered in evidence here and as appears by Mr. Blanc's receipt, paid Mr. Blanc the sum of five thousand dollars for his services in this tax case in which you say you employed him personally, and for his services in connection with ordinance 909, C. S. Is that not a fact?

A. Well, the agreement between Mr. Blanc and myself was that I was to pay Mr. Blanc twenty-five hundred dollars, and that if at any time the case was won and I then determined it was of sufficient value to me I would increase that fee. The matter was
108 concluded. The board of directors, or one of them at least, Mr. Abrams, because I appealed to him to bear part of the expense with me when I engaged Mr. Blanc, cognizant of my act in the matter, determined that it was unfair that I should be made to bear that burden in protection of my rights and they paid it. They paid a subsequent amount that I had contingently agreed to pay Mr. Blanc, a second twenty-five hundred dollars. The wording of that receipt was at my dictation in the water-works office—that it was to cover anything that might grow out of suits in connection with that ordinance. Mr. Blanc came into the suit in connection with the ordinance subsequent to its institution by the committee of 100, and that is how that appears there.

Q. Mr. Blanc, then, as appears by the record in this case, was counsel for the water-works Co. in this case, was he not?

A. He was.

Q. As I understand your statement, it was in accordance with the agreement made with him originally?

A. No; Mr. Blanc disputed my right to force him into this case on that ground. I claimed that one was the continuation of the other and whenever it was determined adversely, as far as my individual interest is concerned, that he would be entitled to his fee in that event, and that this matter being almost the same he ought to assume it. Upon that statement of mine Mr. Blanc said if I thought so he wouldn't dispute it. So he came in. I had that put in the receipt so that there would be no doubt about it in future.

109 Q. (Witness being shown original document marked "B 1," produced in open court by E. T. Manning, clerk of the city council, Mr. Farrar propounds this question:) Is not that the original ordinance as prepared by Mr. Blanc—meaning by that, is not that the original document written out and prepared by him or under his supervision?

A. I am unable to answer that question. That Mr. Blanc drew up that ordinance I have every reason to believe, because I requested him to do so, and I suppose this is it.

Q. You don't know whether that is the original or not?

A. No, sir.

Q. You cannot identify the paper?

A. I cannot.

Q. Mr. Houston, you made a statement just now that you had consulted me about the constitutionality of this act?

A. Yes sir.

Q. Do you mean to say that you consulted me professionally?

A. Oh, no; not at all. It was one of those friendly horseback opinions that I have had you to give me occasionally on that and other matters. I will state now that it has been a custom of mine to inflict questions of that sort on Mr. Farrar whenever I had a chance, for which I have never made him any remuneration.

Q. They have been what you call horseback opinions?

A. Yes, sir.

110 E. T. MANNING, being duly sworn as a witness for plaintiffs, testified as follows:

Direct examination by Mr. FARRAR:

Q. Have you any official connection with the council of the city of New Orleans?

A. I am clerk of the present city council.

Q. Who is custodian of the original archives of the city council?

A. The clerk of the council.

In this connection plaintiffs offer, produce, and file in evidence a duly certified copy of the official proceedings of the city council of September 23rd and 24, 1884, printed.

It is agreed that in case of an appeal in this case these printed

minutes shall not be copied into the transcript, but shall go up in the original.

The witness being called upon produces document marked "B 1" and 4 slips marked "2," "B 3," "B 4," "B 5," "B 6," as the original documents in his possession, as clerk of the city council, referred to in the proceedings of September 23rd and 24th, 1884, just offered in evidence.

It is agreed, these being public documents, that the originals shall not be stamped and filed, but that the clerk of the city council shall withdraw same and furnish certified Chinese copies of them.

111 JOSEPH GARIDEL, being duly sworn as a witness for plaintiffs, testified as follows:

Direct examination by Mr. FARRAR:

Q. Were you a member of the city council in the year 1884?

A. I was, sir.

Q. Look at the document marked "B 1" and state what that document is, to your knowledge.

A. That is the original ordinance introduced in the city council to carry out the provisions of act 56 of 1884, providing for the future water supply of the city of New Orleans.

Q. Is this the original document in the form—so far as the typewriting is concerned, without the erasures—in which it was presented to the committee?

A. Yes, sir.

Q. There are certain interlineations and erasures—for instance, on page 2, the words "beginning with the year of 1885," interlined; on page 3, the word "now," interlined; and also the words "and in all successive budgets for each year successively," interlined, and the word "consecutive," interlined; and also the words beginning "also in," interlined, and the word "in," interlined, and on page 4 the words "have been," interlined, and the words "for each year," interlined—in whose handwriting are those interlineations?

A. I would take that to be Mr. Samuel P. Blanc's handwriting, sir. If my memory serves me well, they were the result of a
112 lengthy discussion with the committee. After this ordinance was referred to the committee by the council we had several sittings of the special committee and had lengthy discussions with Mr. Blanc. I think Mr. Gardiner was present, representing the water-works company. These interlineations, I think, are the result of those discussions. Where the committee suggested a change, either to carry out the spirit of the ordinance or a change in the language in order to do away with any ambiguity, the changes were made by Mr. Sam. Blanc; this is his handwriting.

Q. You are familiar with his handwriting?

A. Very well, sir.

Q. Look at documents marked "B 1," "B 2," "B 3," "B 4," and "B 5" and state in whose handwriting those documents are.

A. Mine, sir.

Q. They appear in the proceedings of the city council of Septem-

ber 23d, 1884, to have been offered by you in the council. Were those amendments agreed upon — the council to be offered?

A. Yes, sir. They were offered by me either as suggestions of my own or as chairman of the committee, carrying out its instructions.

Cross-examination by Mr. BECKWITH:

Q. Mr. Garidel, in reference to the interlineations on Document B, is it your impression that they were made after the original introduction of the ordinance in the council and its reference to the committee?

113 A. Now that I reflect, the corrections must have been made before it reached the members of the committee, because the committee had no power to interline. They could only have made suggestions in the form marked "B 1," "B 2," &c.

Q. Still it would have been within the province of the committee, with the consent of the promoter, to change the construction of sentences, would it not?

A. It was under the impression that those interlineations were the result of our discussions. A section would be read, some member of the committee would have objections to it, and to meet the suggestions of that member those interlineations were made. That is my impression.

Q. Was it not within the rules of the legislative department at that time for a committee to report an ordinance by substitute?

A. Yes, sir.

Q. Or substitute sections that they might deem wise for sections in the ordinance as presented?

A. Certainly.

Q. So that it would not have been an illegitimate exercise of power on the part of the committee to have changed the phraseology or added limitations to the ordinance as they reported it back?

A. It would not have been, sir. I think those interlineations were the result of discussions in the committee-room, as far as I remember.

Q. About what time was expended in the consideration of that ordinance in committee? I suppose it was before them several times?

114 A. I would not like to swear to that, Mr. Beckwith. I am under the impression we had two or three sittings, but it has been so long ago that I don't remember. I know the discussion about it before the committee was very lengthy.

JANUARY 10TH, 1889.

Plaintiffs offer, produce, and file in evidence a certified copy of the minutes of the regular meeting of the New Orleans Water Works Co. of date October 1st, 1884.

Plaintiffs *to be* produced and filed a printed copy of the official journal of the Legislature of the State of Louisiana at its session for the year 1884.

It is agreed in case of appeal in this case that said printed journal shall not be copied into the transcript, but shall be annexed thereto in the original.

It is admitted that the New Orleans Water Works Co. has not paid to the city of New Orleans any taxes except those contained in the certificate, heretofore offered in evidence by the plaintiffs, signed by the secretary of the company.

It is further admitted that the judgment rendered in this court for the taxes for the year 1881, in case No. 3617, and the judgment on the reconventional demand in favor of the New Orleans Water Works Company and against the city of New —, have not
115 been executed on either side and have never been formally satisfied on either side.

THOMAS O'CONNOR, being duly sworn as a witness for plaintiffs, testified as follows:

Direct examination by Mr. FARRAR:

Q. What is your profession, Mr. O'Connor?

A. I am at present chief engineer of the New Orleans fire department.

Q. How long have you been connected, in one capacity and another, with the fire department of the city of New Orleans?

A. About thirty-three years.

Q. How long have you been chief engineer of the fire department?

A. Twenty years.

Q. In your experience as chief engineer, and as having charge of the fire department of the city of New Orleans, and as connected with the fire department, at what time do the majority of fires occur, during the day or during the night?

Upon being requested by opposite counsel to state what plaintiffs propose to prove by this witness, Mr. Farrar said: I propose to show, first, the identity of the water supply contracted for in this contract with the water supply that was being furnished to the city of New Orleans prior to the time that this contract was made, and to show that the specifications contained in this contract, which ap-
116 parently are more onerous than the terms of the charter, and which have been argued in this court and in the supreme court with great emphasis of manner and declamation to be a burden upon this corporation, to be nothing more than a statement of the existing facts as they have existed for a great many years, as to the character of the water supply by day and the character of the water supply by night, and to show that the water supply under this modified contract is just as inefficient as it has been for twenty years, in this town.

By Mr. BECKWITH: My objection is that the question of the performance or non performance of this contract has never been tendered to us in any form of issue, and if the evidence is to be introduced for the purpose of showing fraud or incompetence on the part of either of the contracting parties, particularly the council of the city of New Orleans, that it is incompetent to question the motives, sagacity, or intelligence of the legislative body by showing that

in the opinion of witnesses their contract was indiscreet; and, further, that there is no averment in the petition that the contract was void for the reason of its being an indiscreet contract.

By the COURT: The Court overrules the objection, being of opinion that this suit rests, in part at all events, if not entirely, upon the allegations that in so far as the city of New Orleans is concerned the obligation which was assumed in the contract attacked in
117 this case was without consideration. The court understands the purpose of the testimony which is now offered to be to establish by the proof that proposition by showing that the capacity of the water works as they existed prior to the formation of this contract was such as to entitle the city of New Orleans to the identical supply of water provided for by the contract, and hence that the obligation assumed in said contract by the water-works Co. to furnish said supply of water constituted no consideration for said contract, since the obligation existed prior to the making of same. The court, understanding this to be the purpose of the testimony, considers it relevant and admissible and overrules the objection.

To which ruling of the court counsel for the defendant, The New Orleans Water Works Co., except and reserve this note in lieu of a bill of exceptions. It is understood that the foregoing objections, ruling of the court, exception, and bill reserved by counsel for defendant shall apply to all questions propounded to the witness on the stand, Mr. Thomas O'Connor.

A. During the night.

Q. What relative proportion would you say exists between those fires which occur during the day and those which occur at night—that is, taking the whole number of fires and dividing them into those which occur by day and those which occur by night?

A. It will approximate—I can't be exact as to the figures.
118 Approximately, two-thirds of the fires occur at night.

Q. As a matter of fact, is it more or less dangerous for a fire to occur at night than during the day?

A. That depends entirely upon circumstances—upon where the fire occurs, the location, and many other circumstances.

Q. But, as a general rule, which are the most dangerous, the fires which occur at night or during the day?

A. It is more difficult to get to work at a night fire than a day fire.

Q. Are you acquainted practically with the water supply furnished by the New Orleans Water Works Company to the city of New Orleans from 1860 to this time?

A. I don't understand what you mean by the word practical.

Q. I mean to say by daily and nightly contact with its amount, and——

A. Yes, sir.

Q. Is there any practical difference between the water supply which has been furnished by the New Orleans Water Works Co. to the city of New Orleans from the first of January, 1885, as compared

with the water supply furnished from the first day of January, 1879, to the first day of January, 1885?

A. Do you mean as to pressure or as to its location?

Q. I mean as to pressure.

A. I believe that there is some improvement in the supply furnished since the time you mention.

By Mr. HALL:

Q. You mean since 1885?

119 A. I don't know the exact date Mr. Toby took charge of the water works—it was in 1884 or 1885.

By Mr. FARRAR:

Q. Mr. Toby wasn't in the company at that time, was he?

A. I wish you wouldn't confine me to dates. I haven't got my records and can't commit those dates to memory. Many incidents have occurred to my mind since 1885, and I can't call to mind those things.

Q. The water-works company was organized under an act passed in the Legislature in 1878. Edward Toby was its first president and remained president until 1882. Since that time either Mr. Craig, Mr. Baldwin, or Mr. Houston has been president. Now compare the water supply furnished since 1878, when the city of New Orleans owned and operated the works, with the time when Mr. Toby was president and the time when Mr. Crait and Mr. Baldiwin were presidents?

A. Well, to my mind there has been some improvements under both administrations. There has never been a sufficient water supply furnished to the city of New Orleans for fire protection. Upon taking hold of the fire department in 1869 I directed my attention in that direction and endeavored to have a sufficient water supply if I could. Finding the pressure not sufficient to supply my engines, I induced General Bragg, who was then superintendent of the water works, to put down some wells from which we could get a supply. There were some wells put down under his administration, which enabled our department to do better work.

120 When Mr. Toby took charge he continued to put down wells. I don't know the exact number that were put down, but the wells that were put down facilitated us in our operations very much.

By the COURT:

Q. The supply of water that you get from wells has nothing to do with the pressure, has it?

A. Well, it has something to do with it.

By. Mr. FARRAR:

Q. Go on, Mr. O'Connor, in your own langnage. What was the situation during the whole time when the city owned the water works, from 1869 to 1878?

A. Well, the water supply was already inadequate to the demand.

Q. Is it inadequate now, in your opinion?

Counsel for defendant objects to this question on the ground that it is leading.

The court sustains the objection.

Q. What is it now, sir?

A. It is inadequate.

Q. Go on and state the relations of the water supply, or between the water supply as furnished by the water works from 1868 to 1878, and from 1878 to the first of January, 1885, and from the 1st of January, 1885, to this time. State if there has been any difference in those three periods; and, if so, state what it is.

A. Well, in the earlier part of my administration I found the water supply, as I remarked, inadequate; the pipes were limited, the water mains limited in their extent, and there were two public wells. By my efforts in that direction the number of
121 wells was increased. When the change took place additional pipes were laid and extensions were made to the mains and the number of wells still increased.

Q. What do you mean by the change?

A. I mean when the water-works Co. was organized and took charge of the works; and there has been still further extensions made of the water mains and water has been placed in parts of the city where it never had been furnished before.

Q. Since when?

A. Under the administration of the present water-works company, since 1879. I know of a main laid at Magazine street from Felicity road or from St. Mary or Josephine street to Washington street; an eight-inch main runs along the street. That main has been laid since 1878 or 1879. There has been another main laid on Camp street, extending through Chartres to Esplanade street; another one on St. Charles street. I cannot remember exactly all of them, but I know that these improvements have been made.

Q. Don't you know that those improvements were made prior to the year 1885, during Mr. Toby's administration of the water-works company?

A. No, sir; I do not. I can't remember exactly when they were made. I do know that there has been a pipe laid on St. Charles street since that date; I don't know exactly when. I can't commit these dates to memory; I haven't kept the run of them. I have not been directly connected with the water-works Co.; it is no part of my business to keep pace with them. I don't know
122 much about their operations, and what I do know is from hearsay.

Q. Now, sir, I ask you whether or not the water supply as at present furnished at night from the reservoirs is, in your opinion as an experienced fireman, adequate to the extinguishment of the fires which occur in the city.

A. I can answer that question directly. It is not and never has been.

Q. Is the water supply or pressure upon the mains during the day

of sixty feet adequate within the district within which these mains exist?

A. You will have to qualify that question. In certain parts of the district the supply is adequate, and in other parts where the mains are too small the supply is inadequate from the size of the mains.

Q. In other words, it requires both pressure and adequate mains to give an adequate supply?

A. I said in certain parts of the city our supply is adequate, and in other parts of the city where the mains are small the supply is not sufficient.

Q. Now, sir, compare the system of pumping after 1885 with the system of pumping prior to 1885. Has there been, in your experience, any difference in the system in one or in the other?

A. I don't know of any change that took place since 1885. I do know that there has been some improvement since the stand-pipe was erected and the pumping direct in the mains.

123 Q. Then you date the time of improvement from the erection of the stand-pipe?

A. I can't remember exactly when the system of pumping directly in the mains took place. It was at the time the stand-pipe was erected.

Q. Don't you know when that stand-pipe was erected, Mr. O'Connor?

A. I don't remember the date. I know it was erected under the supervision of Mr. Toby. If you were to ask me concerning any fire that took place in the last twenty years possibly I could tell you the date, but I can't remember things that I am not interested in. I have always felt that I had enough to do to attend to my own business, and if you were to ask me any questions concerning my own department, anything connected with the fire department, the time of a fire, or anything about the machinery in my department I could answer intelligently.

Q. Is not the supply of water connected with your department—isn't it your business to report on your water supply from time to time in connection with your duties as chief engineer?

A. No, sir; my duties as chief engineer do not direct me to do anything of the kind.

Q. Have you not from time to time reported on that subject?

A. I have, sir, reported that the city was not properly supplied with water and have made every effort to have the mains extended—every effort to have a sufficient supply.

124 Q. Now, I ask you again, Mr. O'Connor, to state exactly from what period you date the alleged improvement in the water supply furnished to the city of New Orleans, whether you date it from any specific fact or occurrence in your memory; and, if so, I want to know what that specific fact or occurrence is.

A. Well, I can't remember the dates, but when Mr. Toby had charge of the water works I arranged with him to place a gong in his engine-rooms, so that on an alarm of fire he could start up his machinery and give us better pressure.

Q. Was that gong used during Mr. Toby's administration?
A. Yes, sir.
Q. When that gong sounded what was done?
A. It was understood that whenever that gong struck for a fire in the commercial part of the city they would start up their engines and give us better pressure.
Q. Was that done?
A. It was so reported to me, sir.
Q. Where is that gong now?
A. In their works.
Q. Is it in operation?
A. I can't say. I haven't seen it in operation.
Q. Don't you know that it is not in operation?
A. Please let me state why I don't know. I don't know, because I haven't been in the water-works engine-room for three years.
Q. Can you state any instance since Mr. Toby resigned as president of that company when that gong sounded and the
125 water-works company turned on its pumps at night—that is, between six at night and six in the morning?
A. Well, I would only take the word of Mr. Gardiner as I did of Mr. Toby. The understanding between us was the same—when a fire occurred in the commercial part of the city and the gong struck for it that the works would be started.
Q. Can't you tell by the water supply at a fire, any fire you can name in the commercial part of the city, whether the pumps were turned on or not?
A. No, sir; not very well.
Q. You can't tell the difference between a head of water coming from the reservoir under a twenty-foot pressure and of sixty feet pressed into the mains?
A. Certainly I can tell the difference.
Q. I ask you to go back in your memory to any fire that occurred in the commercial part of the city since 1884 where you have knowledge from the condition of the water supply that those pumps had been turned on in answer to that gong.
A. Well, after some reflection and looking over my record I can cite you one instance—on the night, I think, of November 19th, at the fire on Magazine street between Natchez and Gravier. When the department first got to work the supply was very scant.
Q. November 19th of what year?
A. 1888.
Q. Day or night?
A. Night. The supply was very scant, and after awhile the department got a good supply of water, and I concluded that the pumps were working in the water works. When I got a good
126 supply of water that was the conclusion I arrived at.
Q. At what time during Mr. Toby's administration was this gong erected?
A. I don't remember now, sir. I had that gong placed there by Superintendent Weeks, of the fire-alarm telegraph, but I really can't remember the date.

Q. Now, I repeat to you the question I gave you just now. From what fact within your knowledge do you date what you call the improvement in the water supply furnished to the city of New Orleans?

A. From the fact of getting a greater supply of water than we had before.

Q. Mr. O'Connor, you are supposed to be my witness. I can't lead you. You have stated that you consider that there has been some improvement—that there has been of late years some improvements in the water supply furnished to the city of New Orleans. Now, I ask you from what part within your knowledge do you date that improvement.

A. Well, I have made some tests at fires after the fire was extinguished, and put two or three lengths of hose on the water plug and tested it on a two or three story building. I found that during the day I could get a better supply of water than I had been getting previously.

Q. I am asking you to state in your own language the year in which you fix the improvement of which you have spoken, and, if you cannot fix the year, then state from what fact, circumstance, occurrence, or act in your knowledge you ascribe that
127 increase in the water supply.

A. I can't name dates to you, sir.

Mr. Farrar states to the court that this witness is unwilling, and asks permission to put direct questions.

By the WITNESS: I would like to state to the court that I haven't kept pace with the water-works company. I have conversed with Mr. Toby when he was in the company, and I have conversed with Mr. Gardiner as to the water-works company and the water supply, but I have never committed those things to memory. I have enough to do to attend to my own business.

By the COURT:

Q. Is there anything more important connected with your department than the water with which you extinguish fires?

A. No, sir.

Q. Then why do you say the water supply furnished the city is not connected with your business?

A. I may have misunderstood the attorney's question. I thought he attempted to connect the water-works company with the fire department.

By Mr. FARRAR:

Q. Is it not a fact, Mr. O'Connor, that the improvement which you say you have noted of late years in the water supply furnished to the city of New Orleans by the water-works company dates from the construction of the stand-pipe of the New Orleans Water Works Co. and the system of pumping directly during the day into that stand-pipe?

A. I answered yes very plainly.

Q. Now, let us get down to that point. You date this in-
128 crease in the water supply or improvement, as you call it—in the water supply from that occurrence?

A. Yes, sir.

Q. Now, I ask you do you know during whose administration of the water works that system was established of pumping into the stand-pipe.

A. I believe it was under Mr. Toby's administration.

Q. Then you date the improvement in the water supply from the administration of the water works by Mr. Toby?

A. Yes, sir.

Q. Now, I ask you to compare the water supply as supplied during Mr. Toby's administration of the water works with the supply of water furnished the city during Mr. Gray's administration and at present, as to pressure, conditions of pressure, and manner of pumping, and state if there is any difference between one administration and the other; and, if so, what.

A. Conscientiously speaking, I would like to answer these questions in a very truthful manner. I don't want to answer any question but what I can answer truthfully. I don't want to answer any question but what I can answer truthfully and intelligently. I can't answer that question.

Q. Why not?

A. Because, sir, I don't remember the pressure furnished at night or by day by Mr. Toby. Incidents have occurred under Mr. Toby's administration where I had not sufficient pressure at night and also in the day, and the same incidents have occurred in this administration.

Q. I am not directing your attention to incidents—partic-
129 ular incidents of deficiency. I am directing your attention to the general method of pumping and general service; the pressure at night and during the day during Mr. Toby's administration as compared with Mr. Craig's administration.

A. Well, I have always had complaints to make under both; neither one has been satisfactory. Now, to make a comparison between them I can't very well do it.

Q. Mr. O'Connor, the gist of this case is the comparison of the water supply furnished by the New Orleans Water Works Co. to the city of New Orleans under the contract for the years 1885, '86, '87, '88, and so on, as compared with the water supply furnished by the New Orleans Water Works Co. under its charter to the city of New Orleans from the year 1881 to 1884. Now, I ask you, sir, as a person who ought to know, whether or not there has been any difference in your observation, any general difference or any particular difference, between the general water supply furnished from 1881 to 1885 and from 1885 to 1888; and, if so, what that difference is and what is it due to.

A. All the difference is, so far as I know, that under the previous administration the water supply at night was fairly good and the present water supply at night is not so good.

Q. Then the water supply under the present administration at

night is not as good as it was under the Toby administration prior to 1885?

A. No, sir; I think not.

Q. Now, sir, compare the general water supply under the two administrations during the day.

130 A. I think the present water supply is better. There is more head of water.

Q. In what respect?

A. In the supply throughout the city.

Q. Do you mean to say in the average head maintained?

A. It must be in the average lead or we couldn't get the quantity.

Q. Do you keep a record of the daily lead?

A. No, sir; I only know by practical operations, by placing a lead of hose into a building without any engine. That we have occasion to do at times.

Q. Were you not present at a meeting of the city council very lately with reference to the water supply furnished the city?

A. I had a conference with the fire committee of the city council; yes, sir.

Q. What complaints did you make to that committee?

A. I complained that the city was inadequately supplied with water; that the mains were not sufficiently large. I recommended that the small mains should be taken out and large mains substituted, for the reasons that upon the small mains on streets running at right angles from the river we were sometimes compelled to put on a three or four inch pipe and couldn't get an adequate supply of water, whereas if the mains were increased they would give us an adequate supply. I further recommended that the mains be put in.

Q. Did you complain of the entire inadequacy of the water

131 supply at night?

A. No, sir; I complained that there was no sufficient pressure at night. The point I raised in my argument was that if ninety pounds of pressure was put upon the small mains it would give us a better supply than forty or sixty pounds.

Q. Have you not from time to time, in your capacity as chief engineer of the fire department, complained since 1885 of the insufficiency of water supply in the city?

A. Yes, sir; that was brought about by the fact that the greater part of this city, possibly two-thirds of it, has no protection from fire—no water mains. We have to depend almost entirely upon the cisterns used for domestic purposes and the water from the gutters. It works a great hardship on our department from the bad condition of the streets and then finding no water to work with. That has induced me from time to time to try to induce the city government to provide money to extend those mains.

Q. What kind of water is now furnished from the mains of the New Orleans Water Works Company?

A. River water.

Q. What sort of river water—clear or filtered?

A. No, sir; not filtered; it is in its crude state. Permit me to

qualify that answer. When I say it is not filtered I mean I judge so from its appearance—from the appearance of the water falling from the pipes. I know that there is a great deal of sediment in the pipes as it passes out of them, and from that fact I come
132 to the conclusion that the water is not filtered.

Q. Don't you know, sir, of your own knowledge that the water supplied by the New Orleans Water Works Company is pumped directly from the river into the mains during the day, and from there pumped into the reservoir at night, and supplied from the reservoir through the city by ordinary pressure?

A. I might say yes to that question. I don't think any change has taken place since I visited the works.

Cross-examination by Mr. BECKWITH:

Q. Mr. O'Connor, is it not true that for the purpose of extinguishing fires for the pressure necessary to throw water upon the fires you depend upon your fire-engines?

A. Yes, sir.

Q. That is, for the pressure necessary for throwing water high, you depend upon your steam-engines?

A. We depend entirely upon our engines in this city.

Q. Your capacity to throw water on a high building depends upon the pressure from your steam-engines and not upon the pressure from the water works?

A. Yes, sir.

Q. Now, then, if there is an adequate supply coming to your engines through the mains, the pressure from the water works is a matter of small importance, so far as your engines are concerned, so long as the quantity is sufficient?

A. It makes no difference at all, sir.

Q. Then, so far as extinguishing fires in the city of New
133 Orleans is concerned, since the introduction of steam fire-engines the question of pressure on the mains would only affect the rapidity or quantity of water delivered, would it not?

A. That is all, sir.

Q. So that if the quantity delivered to any locality was adequate it would be immaterial to the fire department what the pressure was from whence it came, would it not?

A. Yes, sir.

Q. Now, do you remember or can you estimate about the capacity, the average capacity, of the steam fire-engines in use in the department to throw water per minute, in gallons?

A. Well, that would depend upon circumstances—first, upon the velocity under which the engines are operated, and, second, it would depend upon the discharge opening.

Q. I am speaking about the service at fires.

A. We keep no record of that, sir; but, judging by an engine working at a velocity of 150 revolutions and working through an inch and an eighth nozzle, we would calculate about 150 gallons, or something like that.

Q. That would be the average?

A. Yes, sir.

Q. Now, take, for instance, an eight-inch main at a pressure, say, of twenty-eight feet, about how many engines would that supply in the average service?

A. An eight-inch main, under twenty-eight feet pressure—well, that would supply from four to five engines.

Q. That would about exhaust the capacity of the main?

A. Well, that is another question we would have to con-
134 sider. That would depend upon the speed and size of the engines. Of course three engines would exhaust it in a very short time with inch and a half nozzles; but by reducing the size of the nozzles, which we are often compelled to do, we could supply five engines. We have to regulate the speed of the engines by the quantity of water we receive.

Q. But five engines in that case would throw about as much water as four in the other?

A. Yes, sir.

Q. Can you tell as precisely what you mean by the terms "inadequate water supply"—whether you mean that there are not enough mains down or that the mains are not large enough, or whether the mains that are down are not properly supplied with water?

A. I base that term upon the fact that I consider that many of the mains throughout the city are not sufficiently large in size, and that the mains should be extended in different directions in order to supply different localities with water.

Q. Now, you don't know, do you, or don't remember, at any time since the water-works company went into possession, of any large mains being taken up and their place being supplied by small mains, do you?

A. No, sir; I don't know of anything of that kind.

Q. Then, what you wanted to say was that in planning the system of distribution of water throughout the city that system was not so planned as to give it an adequate conducting capacity?

A. No, sir; I never did consider that it was properly planned.

135 Q. What effect, if any, upon the distribution of water of the laying of the large pipes from the stand-pipe down through Camp street and through Chartres down to Esplanade street?

A. Well, if the pipe was connected it would give more water—a larger supply of water.

Q. Do you remember whether prior to the transfer of the water works to the water-works company the reservoirs were in good condition up there at the works?

A. No, sir; I don't remember.

Q. Do you know whether the system of feeding the mains at that time was by pumping into the reservoirs and falling from the reservoirs into the mains?

A. Yes, sir; that was the system—pumping into the reservoir.

Q. Then, you think that system was changed some time during Mr. Toby's time, by pumping directly into the mains?

A. Yes, sir.

Q. Is it not true that mains upon which there is no great continual draft of water are apt to get filled and their capacity lessened for a while by sediment?

A. Yes, sir.

Q. That, I suppose, would obstruct the flow of water through those mains for a while after the engines were first put on, would it not, if you had occasion to use those mains for the extinguishment of fires?

A. Yes, sir; sediment has obstructed the flow of water frequently.

Q. Now, will you state to the court how you use four or five engines at a fire where there are not that number of fire plugs
136 or hydrants or wells in the immediate vicinity?

A. Well, we would dam up the gutters by means at our command, place the suction in the gutter, and open the plugs from the front, and if it is a considerable distance we place an engine on the front to force the water.

Q. Under that system you get all the service you can out of all the hydrants that will throw water into those gutters?

A. Yes, sir.

Q. Will you state to the court whether or not that involves a waste of water—that is, whether it is true that considerable water under such a system must get away without being used?

A. There are many times when we don't get a sufficient supply, but when there is considerable water flowing more or less is wasted; that is true.

Q. Then, under the system you are speaking of you sometimes get water beyond the limits of the immediate mains that are on the streets running back from the river?

A. Yes, sir.

Q. Now, about this bell at the pumping works; isn't it true that when that bell was put up it was put into the general system of alarm bells, such as you have in your engine-rooms, indicating the station where the alarm came from?

A. Yes, sir; that bell was connected with the general alarm system: whenever an alarm struck they received it in the water works.

Q. As you received it in the engine-house?

A. Yes, sir.

Q. Now, have you any sort of an idea or can you tell what
137 the increased rate of flow would be through a given pipe as between fifteen feet pressure and the twenty at which you have calculated it?

A. No, sir.

Q. Will you state whether you have anywhere connected with your — or any apparatus under your control that shows the pressure or the mains in the water works?

A. We have not; we have no means of getting the pressure but on the engines.

Q. Just state how it is that a single fire-engine is attached to a plug, where it is attached directly to the plug and set to work—that

is, where the suction is screwed on so as to make a joint with the plug.

A. You want to know the means by which it is attached?

Q. Yes.

A. One end of the suction is attached to the opening of the pump, where is employed a rubber joint, making a perfect joint, and the other end is attached to the plug in the same manner.

Q. The pump, then, is in the system?

A. Yes, sir.

Q. Now, do you take your pressure before you start to pump?

A. No, sir; when the pump is in action.

Q. Then, your gauge shows you what the pressure in the air chamber is resulting from the pressure on the engine, but not what the initial pressure was?

A. No, sir.

Q. So that you have no facility of knowing what the press-
138 ure on the mains is, excepting from its effect in the flow of the water or in the quantity that comes to you?

A. No, sir.

Q. Now, in the case of the fire-wells there, the engines pick it up without pressure?

A. Yes, sir.

Q. Then, the only means you have of judging the pressure would be the rapidity with which the wells filled or the question whether they supplied a number of engines?

A. We can't arrive at the pressure on the pipes—it is all guess-work.

Q. Does it not sometimes happen that by hurry or carlessness, or something of that kind, the valve is not fully opened?

A. Well, in one or two instances that has happened, but it is very seldom; it is a very rare thing.

EDWARD TOBY, being duly sworn as a witness for plaintiffs, testified as follows:

Direct examination by Mr. FARRAR:

Q. What is your present position, Mr. Toby?

A. Cashier of the Canal Bank.

Q. Did you ever have any connection with the New Orleans Water Works Company?

A. I was president of the company for about four years.

Q. From what date to what date?

A. From 1878 to 1882.

139 Q. At what period did you retire from the presidency of the company?

A. I don't recollect exactly whether it was July, 1881, or July, 1882. I think it must have been 1882.

Q. What, during the time of your presidency of the water works company, was the system in force relative to the operation of your pumping machinery and the supply of water to the city during the day and during the night?

A. Well, the pressure was put on in the morning about six o'clock—that is to say, we pumped direct into the mains until six o'clock in the evening, and then the water was pumped into the reservoirs, when the pressure came from the reservoir and not direct from the pumps.

Q. Then, you pumped in the mains from six o'clock in the morning until six in the evening, and from six in the evening until six in the morning? Where did the city get her water from?

A. From the reservoir.

Q. How long did you pump in the reservoir, until you got them full, and then stop the machinery?

A. When there was any demand for water.

Q. Did you operate your pumps from nine o'clock at night until three o'clock in the morning?

A. Very seldom.

Q. On what occasion did you operate them during that time?

A. I can't remember.

Q. I mean what was the cause of your operating your pumps?

A. I don't recollect, unless it was in case of a conflagration.

Q. I don't ask you to give me any specific occasion during
140 that time, but only if you did to state what was the cause or reason of your so operating them.

A. I can't see any reason unless it was a large conflagration.

Q. What average lead of water did you maintain during your administration of the New Orleans water works during the day, by pumping?

A. Well, when I took charge there was very little lead; it averaged about twenty-three feet. After I put in the large distributing mains I kept an average, I think, of from sixty to seventy feet lead in the day.

Q. By the large distributing mains you mean those mains put in in your administration of the water works, the details of which are set forth in your reports to the company?

A. Yes, sir; the Camp-street main and others.

Q. Who erected the stand-pipe at the water works?

A. It was erected in my administration, under the supervision of Moses Lane.

Q. When did you begin to use that stand pipe?

A. As soon as it was completed.

Q. Do you remember what year that was?

A. It must have been before I left the company. I don't recollect exactly.

Q. Then, I understand your testimony to be that after the erection of this stand-pipe and its connection with the large distributing mains laid under your administration, and after you commenced the system of pumping during the day into that stand-pipe
141 you maintained during the day an average lead of from sixty to seventy feet?

A. Yes, sir.

Q. What average lead did you maintain at night?

A. That is regulated by the height of the water in the reservoir.

I believe it was twenty-eight feet if it was full, and, if not, something less. Twenty-three or twenty-four feet, I think, would be an average lead to put it at.

Cross-examination by Mr. BECKWITH:

Q. Do you know, Mr. Toby, whether when the works were transferred to the company by the city the pumps was connected so as to pump directly into the mains or into the reservoir?

A. Either way; by closing down the gates of the reservoir you could pump directly into the mains.

Q. What was the system you found in use when you took possession of the works?

A. Pumping into the mains in the day and into the reservoir at night.

Q. What was the stand-pipe put up for?

A. To regulate the pressure and make it more even, and it acted as a kind of safety-valve on the engine.

Q. Where was the pressure registered or recorded?

A. In the engine-house and at the office in the city.

Q. Was there any set of books kept in which it was recorded?

A. I think not.

Q. Who was superintendent of the works then and directly connected with their operations?

142 A. I was.

Q. You acted as superintendent and president?

A. Yes, sir.

Q. What gauge of pressure did you have—mercury?

A. Yes, sir; a mercury gauge at the office on St. Charles St. and one at the engine-room.

Q. Who operated the engine?

A. Mr. Bloomfield.

Q. Who else was there?

A. I think a man named Easton; there were two assistant engineers.

Q. You don't know what the pressure was at the works?

A. Oh, yes; I used to go to the works.

Q. You took no record of it?

A. No, sir.

Q. And you are speaking from memory at this time?

A. Yes, sir.

Q. You had the cement mains, or what was known as the cement mains, removed at that time?

A. I remember they were, because they would not stand the pressure.

Q. Are you certain the pressure was carried to seventy feet?

A. I am pretty well satisfied of it. I made several tests. I made one with Mr. O'Connor and others on Poydras street, and threw water over the Moresque building.

Q. What was the pressure generally carried?

A. I think sixty to seventy feet.

Q. How much pressure did it take to overflow that mercury
143 gauge in your office?
A. I can't tell you.
Q. Did it ever overflow while you were there?
A. No, sir.
Q. Wouldn't it overflow at sixty feet?
A. No, sir. I am certain of that.
Q. What was it gauged at?
A. I can't tell you.
Q. What kind of gauge was it? How was it attached to the mains?
A. It was attached by lead connection.
Q. What was the principle under which that gauge operated?
A. I can't tell you.
Q. You got your impression from that gauge?
A. Yes, sir.

By Mr. FARRAR:

Q. Do you mean you got your entire impression from that gauge?
A. No, sir; I had that gauge and another gauge.

By Mr. BECKWITH:

Q. Where was the other gauge?
A. In the engine-house.
Q. What kind of a gauge was that?
A. The same kind. During Mr. Lane's time the pressure was tested with a string gauge.

By Mr. FARRAR:

Q. You are certain, as you stated, that after these cement mains were removed and the stand-pipe erected and the system established
of pumping into the stand-pipe that a pressure between
144 sixty and seventy feet was maintained as a rule during your administration?
A. Yes, sir.
Q. It was your business to know that?
A. Yes, sir.

Counsel on behalf of the city of New Orleans offer, produce, and file in evidence all of the testimony and documents introduced and filed herein in behalf of E. Conery, Jr., *et als.*, the original plaintiffs herein.

Counsel for the original plaintiffs, E. Conery, Jr., *et als.*, object to the city of New Orleans making any offer of testimony in this case on the ground that the amended answer, in response to which this testimony and evidence is offered, tends to change the issue in the case and upset the orderly conduct of the case as provided in the code of practice, and for that reason only this offer by the said city of New Orleans should be excluded.

The defendant, The New Orleans Water Works Co., objects to the

evidence as coming from the city of New Orleans as it has objected to the evidence coming from E. Conery, Jr., *et als.*, reserving all of the bills of exceptions and objections that have been taken to said testimony and insisting upon all of the estoppels that the law places upon the city of New Orleans in reference to its position in the litigation and as a party to the contract attacked in this case.

145 The court is of opinion that, in so far as the original plaintiffs in this case are concerned, it is competent for the city of New Orleans to change the position originally taken by it by the filing of a general denial and to come into court and admit all of the allegations contained in plaintiffs' petition, thus abandoning the defense originally made; but that in so far as the codefendant, The New Orleans Water Works Company, is concerned, the city of New Orleans having originally committed itself to a denial of all the allegations contained in plaintiffs' petition, the rule of practice, aside from any question of estoppel, ought to preclude the city from now changing its position by its pleading so as to affirm as against its codefendant, The New Orleans Water Works Company, that which the said city of New Orleans is on record in this suit as denying. Hence the court deems it sufficient to hold that, as the said city has no right *quo ad* its codefendant to amend its general denial by affirming now that which it formerly denied, the court considers it incompetent for the said city to offer evidence in support of pleadings which themselves are inadmissible. These reasons, taken in connection with the reasons the court has heretofore given upon cognate questions which have been raised, are deemed sufficient for excluding the testimony which has been offered in behalf of the city of New Orleans, it not being the intention, however, of the court to hold that the city would be estopped in another

146 proceeding from setting up matters contained in the supplemental pleadings herein filed, the basis of the ruling not being predicated upon the estoppel urged by the New Orleans Water Works Company.

To which ruling of the court the city of New Orleans excepts and reserves this note in lieu of a bill of exceptions, and annexes hereto as part hereof all of the said evidence and testimony.

The original plaintiffs having now closed their case, and the defendant being about to offer evidence in support of its answers filed herein, the plaintiffs move the court to compel the defendant, The New Orleans Water Works Co., to elect between the averments of its original answer and the averments of its amended and supplemental answer, and to declare whether or not it proposes to stand upon the defense stated and averred in the original answer—that the water-works Co. had never lawfully and properly accepted act 56 of the acts of 1884, and that said act 56 of the acts of 1884 was not material to the validity of the contract attacked in this case, the said contract having a basis to rest upon independent of said act 56 of the acts of 1884, or whether it proposes to stand upon the averments contained in its amended and supplemental answer wherein it is averred that it has accepted act 56 of the acts of 1884, that ordinance 909 and the contract made thereunder are based

upon said act and the same are valid. In support of this
147 motion the movers refer to and make part of this motion the original answer and the amended and supplemental answer of the defendant, The New Orleans Water Works Company. The city of New Orleans asks leave to join in the above motion.

By the COURT: The rule, as established by the supreme court in this State, to the effect that the better practice is to raise questions of a character similar to this upon objections to the introduction of evidence rather than upon motions to strike out pleadings is a perfectly well-established rule which I have no disposition or desire to depart from. It is a rule—one which applies more particularly to cases in which the alleged inconsistent positions are assumed in different pleadings rather than to such cases where the alleged inconsistent positions are assumed in the answer or petition, as the case might be. For instance, it may well happen that a plaintiff in filing his suit will allege in the same petition two inconsistent grounds of action, and in that case I apprehend the proper practice under our rule would be to call upon the plaintiffs to elect between those two inconsistent grounds of action set up at the same time in the same paper. The same thing may be said in regard to a defendant — sets up inconsistent defenses in the same answer. It seems to me that would be no good reason, under
148 the same circumstances, at all events, why such defendant should not be called upon by the plaintiff to elect as between the two inconsistent defenses set up in the same answer, and more especially would this be the case if the one or the other of the defenses was not of such a character as would necessarily involve the introduction of evidence in its support, because if such defenses do not involve the necessity of introducing evidence the opportunity to raise the question as to the right of the defendant to urge such inconsistent defenses upon the offer of evidence in support of it would never arise, and, consequently, if the rule be applied that such questions can only be raised upon objections to the introduction of evidence, the plaintiff would be deprived entirely of his right to challenge the propriety of the pleadings.

Now, I understand the rule of practice in this State which requires that pleadings shall be consistent and not contradictory to each other to apply as well to the pleadings of the defendant in the case as to the pleadings of the plaintiff, because, as has been remarked by one of the counsel, matters of averment are frequently set up by way of defense. There is no replication under our law and the same reason which exists for applying the rule requiring pleadings to be consistent to the plaintiff also exists in the application of that rule to the defendant. If the inconsistent positions of the defendant in the case are assumed merely in argument
149 as a matter of course the right of the plaintiffs in the case to demand that these positions should be made consistent with each other is also a matter that rests entirely in argument. They can demand it in argument. The court has no right to control the argument of counsel, and therefore cannot require counsel to make

his argument a good, logical, or a bad argument. He makes his argument to please himself; but when it comes to a question of pleading, a question of the right of the litigant to appear in court and to say in one document which he files by way of defense one thing, and in another document which he files by way of defense to the same suit another thing, I think, under the law governing practice in this State, the court has the right to require that he shall determine between the one or the other of the two.

Whether that power of the court ought to be exercised upon a motion requiring the defendant to elect as between one or the other of the defenses, it seems to me, would depend somewhat upon the circumstances. If, in other words, the position which is complained of as being inconsistent with the original position taken up by the defendant in the case is such a position as will not necessarily involve the introduction of evidence, why, then, the right of the plaintiff at the beginning of the defense certainly ought to exist in some shape or another to challenge the defendant's right to stand upon the two positions alleged to be contradictory with each
150 other.

In this particular instance the court is of opinion that the two answers which have been filed by the defendant in this case, and upon which this motion to require it to elect is predicated, are inconsistent and contradictory with each other.

In the original answer, as the court understands it, the defendant sets up that the acts of the Legislature in question (No. 56 of 1884) could not become operative in so far as to effect any change or modification in the charter of the defendant company, unless accepted by the action of the corporation acting through its members—a majority of the stockholders; and it is also set up, as the court understands it in that answer, that there has been no such acceptance of that act.

The court understands the substance and meaning of this original answer to be that the rights and obligations of this defendant company could not be affected by the act of the Legislature in question with respect to the matter in controversy, unless that act had been accepted by the company in the manner indicated; that the act had not been so accepted, and that those rights and obligations of the defendant company had not therefore been affected by that act of the Legislature; and, as a second proposition specifically set forth in that answer and growing out of the first, that the act of the Legislature in question was therefore wholly immaterial to
151 the validity of the contract which is attacked in this case, and that the contract therefore stands as a valid contract independent of any validity or virility derived from said act of the Legislature. This is what the court understands to be — meaning of the original answer filed in this case. The court understands the meaning of the supplemental answer to be that by reason of the effect upon the relations between the city of New Orleans and the defendant company produced by the decision of the supreme court of this State in which it was held that the amount of taxes annually assessed against the defendant company and collected should

be held as an equivalent for the amount of water which the defendant company was obliged to supply by its charter to the city of New Orleans, the parties concerned—that is to say, the city of New Orleans and the defendant company acquiesced in, if they did not promote the passage of, act 56 of 1884, and in the ordinance of the common council of the city of New Orleans, which is said to have been passed pursuant to the authority of that act and made the contract which is here attacked as a part and as a conclusion of the one general arrangement for the settlement of the relations between the city of New Orleans and the defendant company upon a basis other than that established by the supreme court to which I have referred. The court understands this second and supplemental answer to set up act No. 56 of 1884 as one of the features,
152 factors, and links in the arrangement which ultimated in the contract which is here attacked; and whilst it may not and probably does not necessarily follow in construing this supplemental answer that this act of the Legislature is relied upon as the only source of authority for the contract in question, it is nevertheless true, as the court believes, that the act is set up as one or a source of authority for said contract, whereas in the original answer the court understands it to be distinctly asserted that the act in question is wholly immaterial to the contract, was never accepted by the defendant company, and hence has no effect upon the rights and obligations of the defendant company. These two positions the court considers as inconsistent with each other. The court is of opinion, inasmuch as the defendant may not see fit to offer evidence with regard to any fact set up in the supplemental answer inconsistent with the matters, as under those circumstances the plaintiffs will not have an opportunity of raising the question which is here raised by way of objection to the introduction of evidence, that it is competent for the plaintiffs at this time, at the opening of the defense, to challenge the consistency of defendant's pleadings and to invoke the ruling of the court upon the question as to whether or not the defendant, having appeared in court and filed the original answer, which is of record here, can by means of a supplemental answer change the issue as it was originally contemplated and take
153 another position than that which was originally taken, or, the plaintiffs not choosing to put the question in that form, it is equally competent for them to give to the defendant the choice as is done in the motion to elect, thus giving to the defendant the privilege of saying that it will stand upon the position originally taken or that it will stand upon the position taken in the supplemental or amended answer.

The court therefore thinks that the defendant ought to be required to elect, first, whether it stands upon the position that act 56 of 1884 is operative as to its rights and obligations under its charter and under the contract which is attacked in this case, and whether it has accepted or has not accepted said act of the Legislature in such manner as to be bound by its conditions; second, whether it relies upon said act 56 of 1884 as material to the validity of the contract attacked or not.

To which ruling of the court counsel for defendant except and reserve this note in lieu of a bill of exceptions.

Testimony and Notes of Evidence Taken in Open Court on Behalf of Defendants on January 16th, 1889, and Filed January 28th, 1889.

Civil District Court for the Parish of Orleans.

154 E. CONERY, Jr., *et al.* *vs.* N. O. WATER WORKS CO. } No. 15774, Division "C."

Note of evidence.

Counsel for the defendants offers in evidence:

1st. The act of the Legislature of the State of Louisiana of date —— 1, 1833, entitled "An act to incorporate the Commercial Bank of New Orleans under the agreement." At the request of counsel for the plaintiffs, counsel for the defendants states that this act is offered for the purpose of showing the relation between the City of New Orleans and the New Orleans Water Works Company and the plaintiffs as a part of the evidence.

2nd. An attested copy of the notarial act passed before Andrew Hero, Jr., notary public, on the 19th day of January, 1869, between the city of New Orleans and the Commercial Bank of New Orleans, marked def't "A."

3rd. The charter of the city of New Orleans, known as the charter of 1870, being act No. 7 of the acts of 1870, extra session, and all the acts amendatory to the same.

4th. The existing city charter, being act No. 20 of the acts of 1882, and all acts amendatory thereof or relating thereto.

5th. Act No. 133 of the acts of 1880, entitled "An act to liquidate the indebtedness of the city of New Orleans," and so forth.

155 6th. Act No. 67 of the acts of 1884 amending said act No. 133 of the acts of 1880, last offered in evidence.

7th. The entire record in the case of The Board of Liquidation of the City Debt *vs.* The New Orleans Water Works Company and City of New Orleans, No. 16458 of the docket of the civil district court, and the transcript thereof, being on file in the clerk's office in the supreme court of the State of Louisiana, at New Orleans, under the docket number 9816 of the docket of that court. It is understood that in case of an appeal the transcript and record need not be copied into the record when taken to the supreme court; that the record already on file shall be used in that court.

8th. An attested copy of the original bill of complaint in the case of The City of New Orleans *vs.* John A. Morris and others, No. 8864 3 of the docket of the circuit court of the United States for the fifth circuit of the late district of Louisiana, now the eastern district of Louisiana, m'k'd def't "D."

9th. The official printed report of the department of water works and public buildings of the city of New Orleans from December 9th,

1876, to December, 1877, being the official printed report, marked def't "C."

By Mr. FARRAR: What is the object of offering this last document; what is its relevancy?

By Mr. BECKWITH: It is offered to show the exact relation-
156 ship of the parties at the time of the transfer of the works, and as proof tending to disprove the proof offered here or sought to be offered by the plaintiffs that this bargain of the city of New Orleans was an unconscionable bargain, because the benefits had all been with the water-works company and the burden all on the city.

Counsel (Mr. Farrar) objects to this evidence upon the ground that it is utterly irrelevant.

The court is of opinion that the document offered in evidence, being a report as to the condition of the water works at the time that said water works was the property of the city of New Orleans, is admissible in evidence for the purpose of meeting the proof which has been offered on behalf of the plaintiffs as to the quantity of water furnished by the water-works company during the past twenty or thirty years.

The court is further of opinion that, in so far as the objections urged against its admissibility for any other purpose than that just stated by the court are concerned, the ends of justice will be met by holding that these objections should be to the effect of the document offered.

To which ruling of the court the plaintiffs reserve a bill of exceptions and make this note on the record in lieu of a formal bill.

157 Counsel for the defendants offers in evidence the attested copy of the notarial act of transfer and sale of the water works from the city of New Orleans to the defendant company, passed before G. Le Gardeur, Jr., April 9, 1878, marked def't "D."

11th. A certificate, under the seal of the water-works company, showing the total number of shares of the company to be twenty thousand (20,000) shares, m'k'd def't "X."

12th. A certificate showing the total number of shares of stock in the books standing in the name of the board of liquidation of the city debt to be 3,920, m'k'd def't "E."

13th. A certificate showing the total amount of money paid by the defendants to the city of New Orleans for taxes since 1884, marked def't "F."

14th. The certificate showing the total amount of dividends paid to the city of New Orleans and the board of liquidation on said shares of stock from April 14th, 1885, down to the present time, marked def't "G."

15th. A printed document containing attested copies of the city ordinances granting the right to individuals and corporations to lay pipes to the river since 1879, marked def't "X."

Counsel for the plaintiffs objects to the last offer upon the ground that it is entirely irrelevant to the issues of this case.

Counsel for the city of New Orleans joins in the objection made by Mr. Farrar.

158 The court sustains the objection, being of opinion that the ordinances offered in evidence are irrelevant to any issues involved in this case.

To which ruling of the court counsel for the New Orleans Water Works Company excepted, and then and there produced the document offered, marked "H," and asked that the same be filed and identified and made part of this bill of exceptions, and which is done accordingly.

By Mr. HALL: This statement to be taken in lieu of a formal bill of exceptions.

16th. The defendant, The New Orleans Water Works Company, offers an attested copy of the ordinance No. 3287, council series, approved October 26th, 1888, marked def't "K."

Counsel for the plaintiffs objects as irrelevant to the issues of this case, the court having already ruled that the city of New Orleans is incompetent to change her position in this matter on the exception of the defendant.

The court admits the document.

To which ruling of the court the plaintiffs except and reserve this note in lieu of a formal bill of exceptions.

Mr. FRANK N. BUTLER (oath waived by counsel).

Direct examination by Mr. BECKWITH:

Q. What relation, if any, did you hold to Mr. Blanc?

A. Well, sir, we were—do you mean professional relations?

159 Q. Yes, sir.

A. We were partners at law—partners in this case for awhile—and the business that came into the concern was on the joint benefit of Blanc & Butler, and for awhile we were partners in name except in certain suits. In certain suits we put them upon the firm docket and enjoyed them mutually and equally.

Q. Did you or not occupy the same office up to the time of his death?

A. Yes, sir; from, I think, October, 1882, or October, 1883.

Q. Do you know whatever became of the papers of Samuel P. Blanc at the time of his death—papers relating to his business?

A. I was one of the executors of his will, and with Mr. Jules Blanc, his father, administered his estate as it was closed and turned over to his widow and children.

Q. Do you know where the papers relating to his professional business are or ought to be?

A. They are in my office, and have been there ever since his death—all that I know of.

Q. Have you made any search or examination among his papers for a written memorandum of the business relation between him and Mr. Houston relative to the tax suits and services for him relating to the water works?

A. Yes, sir; I have. At your request I instituted a search for the document.

Q. To what extent did you make that search?

A. As thorough as I think it could be made. I went through every paper in his private safe and failed to find it there.

160 I then examined the papers in the pasteboard packages endorsed in matters connected with the New Orleans Water Works Company for contracts and so forth, and also in an envelope endorsed E. Conery *versus* The New Orleans Water Works Company, and failed to find a written agreement there.

Q. During your examination of his papers as executor or administrator under his will did you ever come across it?

A. Not to my knowledge. I have no recollection of ever having seen it in my life.

Q. Do you know of any papers of that character relating to his business having been removed from his office and carried away to other places?

A. No, sir.

Cross-examination waived.

JAMES D. HOUSTON, sworn on behalf of the defendants, says:

Direct examination by Mr. BECKWITH:

Q. Mr. Houston, will you now state the contents of the paper as you recollect it, giving all your recollection of the memorandum that you referred to in your cross-examination while upon the stand as a witness for the plaintiffs in this case?

Objected to by counsel for the plaintiffs upon the ground that no proper foundation has yet been laid to prove the loss or destruction of this instrument.

161 Counsel for the city joins in the objection.

By the COURT:

Q. Was that paper made in duplicate?

A. A single memorandum.

Q. Signed by both of them?

A. I won't be positive of the signature. It was simply to prove it was drawn some time prior to this act.

Q. Have you any knowledge of the whereabouts of that paper?

A. I have not.

Q. Is it not in your possession?

A. It is not.

Q. Have you any reason to suppose it was in Mr. Blanc's possession?

A. Every reason to suppose it.

Q. Have you any reason to suppose it was anywhere else?

A. Nowhere else. My reason was that when we came to the payment of the fees there was a special agreement between us, and I told him then to produce the memorandum—the memorandum will bear out the statement I made of what our agreement was—

and he came back the next day and accepted my agreement. I don't know now whether he went to consult his memorandum or not, but there was a dispute between us as to whether he was bound to go on up in the Supreme Court of the United States in all the litigation growing out of these cases. That was my understanding. I told him then to consult his memorandum. I testified to the same matter in the United States circuit court when Mr. Blanc was living. Mr. Goldthwaite questioned me and I told him Mr. Blanc had a memorandum and he was then living and he could
162 consult him. It was the case of The Southern Brewing Company *vs.* The New Orleans Water Works Company and The New Orleans Water Works Company *versus* The Southern Brewing Company.

The court overrules the objection; to which ruling of the court the plaintiffs except and take this note in lieu of a formal bill of exception.

Q. Will you state the contents of that paper as you recollect it, giving all your recollection of the memorandum that you referred to in your cross-examination while on the stand as a witness for the plaintiffs in this case affecting the arrangement or the agreement between you and Mr. Samuel Blanc?

A. The agreement between me and Mr. Blanc was, Mr. Blanc was employed by me individually, and that I in nowise bound the New Orleans Water Works Company to pay him any fee, but would, in case of the successful termination of the litigation, urge upon the company the payment of the fee. I desire now to explain exactly what took place. Mr. Blanc said to me——

Objected by counsel for the pl'ffs.

WITNESS: What I am going to state is the written contents of the document and how it came about.

By Mr. FARRAR:

Q. We do not want to know that. We want to know the contents.

By Mr. BECKWITH:

Q. Will you state, as near as you can, if you can remember, first, whether the contract was signed by you and Mr. Blanc, and, second, what was written in it, as near as you can recollect?

163 A. I am not positive whether it was signed by Mr. Blanc or not. I have just stated that it was a written memorandum; that it was agreed between me and Mr. Blanc that he should have the contingent fee at the end of the suits growing out of this litigation—suits growing out of this act. At the time that Mr. Blanc drew the act there was no fixed fee in regard to the drawing of the act or drawing the ordinance at all. It was a personal employment with Mr. Blanc to take charge for me of the water-works interest and my own lawyer indirectly in the tax cases. The act was subsequently to the tax matter and was considered by us as a contingent

fee. Mr. Blanc urged that why he charged me a certain fee as an individual that if it was "successful litigation" that he did not feel that I as a friend ought to ask him to give his services gratuitous to other people, and in the event of obtaining any great advantage for it I should try to get him a larger fee. I agreed to that proposition; draw it up in writing; that I do not bind them to pay you any such fee, or that I am authorized to bind them, and it was so stated that I was not authorized to bind him to pay any fee; but it also stated that in the event of taking the view he had of it or if he should be entitled to such a fee; that was the memorandum.

By the COURT:

Q. You left some doubt in my mind as to how much of this agreement and understanding was put into this memorandum and how much was left out.

A. I can't say how much.

164 Q. You can't say how much of this was put in writing?

A. No, sir; I can't say how much was reduced to writing; but that was the understanding and the agreement, and I was not in very good health, and in case that there might be litigation, and that I should be charged with overstepping my authority as an individual or as an officer of the company, and it was that that I had reduced to writing, so that there would be no question about it. I will state that I did the same thing with Mr. Beckwith prior to that. I employed him as an individual stockholder, and it was so understood between us that the company was in nowise indebted to him or anything at all; but it was understood then that if he could get the money I would be willing that it should pay him a larger fee than he and I agreed upon.

By Mr. BECKWITH:

Q. You were State tax collector at that time?

A. I was.

Q. Will you state just exactly what was the professional relations between you and Mr. Blanc at that time?

A. Mr. Blanc was my attorney in all private matters and as State tax collector. Mr. Blanc was an attorney to whom I felt entitled to go at any time on any matter in which I was personally interested.

Q. At what time did you first hold any official relation to the New Orleans Water Works Company, directly or otherwise, as near as you can state?

A. I think the year 1881.

165 Q. Who was present at that time?

A. Edward Toby. I was one year in the board of directors with Mr. Toby—a year and some months.

Q. Was it during the last period of Mr. Toby's administration or the first?

A. It was during the last period of his administration.

Q. To what extent, if any, did you as director give your attention to the affairs of that company?

A. I gave very close attention, as I was very deeply interested

and, further, because Mr. Toby originally objected to my entry upon the board as a director.

Q. What interest as a shareholder had you in that corporation at the time you were director under Mr. Toby's administration?

A. I was the owner at that time, I think, of about three thousand (3,000) shares. I became a large owner subsequently.

Q. Did you pay any attention to the practical workings and operations of the water works under his administration?

A. Very close attention, because I was trying to increase its revenues.

Q. Do you know or can you state what was the pressure carried on the mains at that time—luring the year and fraction that you were there?

A. I can. From 38 to about 42 feet lead was what we carried. It may have ran up as high as 45 feet; not higher.

Q. Will you explain to the court how the service through the mains to the private residences or consumers is held in ownership as respects the company? Is it for private ownership of
166 the consumer or the ownership of the company?

Counsel for the plaintiffs objects. The court sustains the objection.

A. They belong to the individual householder from the time they leave the bank, I think.

Q. Are they or not subjected while in use to the same pressure as the mains to which they connect?

A. Yes, sir; they are always in use up to the opening of the hydrant. The pressure stays right up to the faucet of the hydrant, whether they are running or not.

Q. Was there any trouble from the bursting of the service during the administration of Mr. Toby or while you were connected with it?

A. None whatever; none whatever. We had on Esplanade steet, according to my recollection, to the latter end of his term or the beginning of the new term, a long line of cemented pipes. My impression is I took them up when I became superintendent. If I did not he took them up at the latter end of his term. I speak only from my memory and not from the report.

Q. When do you remember the first advance in pressure taking place after Mr. Toby's administration?

A. The advance started almost immediately after he went out and continued up until about a year ago, when I severed my connection. I know nothing since. The first advance he made broke the mains on Carondelet street.

Q. About what time was that?

A. I suppose it must have been in 1883 or 1884; along there somewhere. Broke the mains from Poydras street; also half
167 the running near the levee, and broke a great part of the private connections.

Q. About how much was that increase? Do you remember?

A. Five or six feet, I think. It was less than fifty feet lead, because we had a discussion with some parties who were desirous of

putting in elevators, and while I was superintendent I agreed to guarantee the running of the elevator or one or two elevators while our lead was less than the height at which the water ran.

Q. When, according to your recollection, was the next advance in the pressure?

A. The next advance was after that contract was made. Then a certain fixed lead was kept steadily. Before the lead was fluctuating. We aimed to keep our lead pretty near, but it fluctuated. We did not make any provision at all for keeping the lead fixed.

Q. Did the lead not reach sixty feet, what, if any, response came from private connections?

A. Breakages all around—breakages all around the sixty feet.

Q. Do you remember whether the city or the board of liquidation held the same number of shares of stock at or about the date of the execution of this contract attacked in this suit that it does now?

A. It did not hold the same amount—that is, it did not hold undisputed possession of the same amount at that time.

By Mr. FARRAR:

Q. 4,344 shares, was it not?

168 A. Yes, sir; over 4,000 shares, I think.

By Mr. BECKWITH:

Q. Do you remember when the first dividend was paid on the water-works shares?

A. I don't quite comprehend your question.

Q. Do you remember when the first dividend was declared by the water-works company?

A. I was not a member of the board at that time. I had no connection with the company at that time.

Q. Was it before or after you had connection with it?

A. Before; when the first dividend was declared.

Q. Do you know what effect, if any, this adjustment of the contest between the city and the water-works company about the taxes had upon the market value of the stock?

A. I do.

Q. What was it?

A. It ran up from, say, 46 or 47 to 60—something like that—within that space of time. It varied from 45 to 50 prior to the contract.

Q. To what extent, if any, was that due to the adjustment of the contention between the city and the water-works Co. relative to its water supply?

A. It was almost entirely due to that.

Q. What effect, if any, in your opinion, would it have upon the shares of the water-works stock to-day if it was unsettled and the contract rescinded?

A. I think the stock would go back to fifty.

169 Q. To what extent, if any, was the city of New Orleans benefited by such advance, and to what extent, if any, would it be injured by its falling back?

Counsel for the plaintiffs objects upon the ground that it is a mere matter of opinion by the witness.

The court overrules the objection.

A. It would be in the stock. They would suffer to the extent of twelve dollars ($12.00) a share. If the litigation was settled to-morrow I will give them for every share they have got seventy dollars. I will take it all. If it was decided unfavorable to the company I would not give them fifty.

Q. It appeared in your examination while you were on the stand as a witness for the plaintiffs here that during the period of the time of your connection with the New Orleans Water Works Company you were acting as superintendent. Will you tell us how you came into that position and what duties it involved and how you came to drop it?

A. Well, during the last term of the Toby administration the affairs of the company had gotten into such a deplorable condition that it was only able to pay one and a half per cent. (1½ %) dividend, the result, as I considered as a large stockholder, in mismanagement. We had an election, and I went around among the other large stockholders and asked a change in the directory as a solution of the troubles of the company. That change took place and the board was defeated. Mr. Toby was a candidate for re-
170 election, and we defeated them, I think, some three or four or five thousand votes. Mr. Toby did not turn over the company's affairs to the new board. He left and he never came back. We went around and ascertained the condition of the books of the company as best we could. We found the books in such a condition that we could not afford to pay a salary, and Mr. Baldwin agreed to take the presidency without a salary, and I agreed without a salary to try to work it up, the two positions that Mr. Toby held representing some sixty shares, for the service of which he got six thousand ($6,000.00) a year. I continued to act as superintendent and do all the work, except as to signing the stock, up to 1884 some time, when I resigned the position, because I thought then that it ought to pay me; that they ought not to ask me to do it gratuitously any longer. At my resignation Mr. Gardiner was elected as superintendent at a salary, I think, of three thousand six hundred ($3,600.00) a year. Mr. —— was elected secretary and treasurer in Mr. Gardiner's place, and then I became simply a member of the board. They created the position of vice-president, and I was elected to fill it—in other words, designated as a director to control the affairs of the company in the absence of the president, and yet have a supervision over the affairs of the company during his presence in the city.

Q. In what condition did you find the records and works when you and Mr. Boyd took possession, after the abdication of Mr. Toby?

A. As I say, we found the records there. We found there
171 had been very little, if any, improvements made. We found everything there though, as I say to you, Mr. Toby did not turn over the affairs of the company properly, but left them, as I

would consider, a free — style on the day of the election. Soon afterwards he begged me to sell his stock and the stock that he controlled belonging to Pierce Butler.

Q. A certified copy from the records of the water-works company has been produced here, showing the payment of six thousand dollars ($6,000) to you on the score of your services as superintendent.

A. Yes, sir.

Q. Explain that.

A. Upon my resignation the conclusion was that this contract having been made and no opposition having been made at that time or contemplated, the company was in such a financial condition they thought they ought to remunerate me for the services I had given, and, I think, it was on the motion of Mr. Baldwin, but against my protest. At the time, Mr. Baldwin said he found what I had done, and that I ought to be paid on the company having been gotten into a decent condition for the services I had rendered to the administration.

Q. Was that $6,000 your property in absolute ownership when you got it, or did you hold it in trust for any reimbursement?

A. No, sir; it was absolutely my own and spent by me, or wasted by me, as the case may be. I want to state now that, outside of a cigar or a treat to a drink of whisky, I never gave anybody in connection with the council, Legislature, or anybody else anything
172 at all, and that same courtesy I have extended to everybody else as well as to those gentlemen.

Q. Will you state as explicitly as you can the exact relation of Mr. Blanc to the promotion or urging of the ordinance No. 909 to the city and the subsequent — or preparation of the contract attacked here.

A. It was at my request that Mr. Blanc drew up the ordinance, and at my request he drew the act, and at my request he went over the contract to see whether it would hold or not. After the passage of the act and the passage of the ordinance Mr. Blanc and I then considered it a concluded matter. I supposed at that time Mr. Blanc considered, under our agreement, that I was going to urge upon the company the payment of his fee that he was to get for the company as well as for me.

Q. Will you state whether Mr. Blanc held any nearer relations to the company as its counsel than I did at the time?

A. None whatever. The same as you held, and Mr. Farrar held. Mr. Farrar held a little differently prior to that. He was employed—no, sir.

Q. What I mean to say is, was I not as much the counsel of the company, by general engagement, at that time as Mr. Blanc?

A. Every bit, sir. Yes, sir.

Q. Do you remember whether I was consulted at that time about this act?

A. You were not; that is my recollection.

Q. Will you state explicitly the circumstances under which the two payments of two thousand five hundred dollars ($2,500.00),

making five thousand dollars ($5,000.00), that are involved
173 here, were given to Mr. Blanc?

A. It was never carried out. The first payment was the contingent fee agreed upon between us. The second payment was the additional fee that I had agreed I would urge in the event of success of the matters.

Q. Do I understand you to say that the contingent fee as agreed on between you and Mr. Blanc was originally $2,500?

A. Yes, sir.

By the COURT:

Q. What do you mean by a contingent fee?

A. In case of success that I individually was to claim two thousand five hundred dollars ($2,500.00) in the case of the tax suits. This was a continuation of the tax suit and so considered between Mr. Blanc and myself.

By Mr. BECKWITH:

Q. The other two thousand five hundred dollars ($2,500.00) reduced the amount that you had promised him you would undertake to get the company to pay additionally in the event of services?

A. Yes, sir.

Q. Will you state precisely what services he was to perform upon which the original two thousand five hundred dollars ($2,500.00) was contingent, to which this subsequent agreement related?

A. The original was a tax suit.

Q. You mean by tax suit the one in which the validity of the tax was tested?

A. Yes, sir; and he was to continue that on up to the Su-
174 preme Court of the United States or wherever he took it, and subsequently to that drew up the act, and when he drew up the act, which was a subsequent agreement, that if the thing succeeded—if this was settled by the passage of this act and ordinance—I was to consider that a wipening out of the Supreme Court matter or the fulfillment of that obligation or the same if I had won the case in the Supreme Court of the United States or the supreme court of the State, and he would ask then that I should pay him an additional fee, or that if I did not I should urge upon the company to pay him.

Q. That is, you considered the adoption of this act under ordinance No. 909 as a solution of the difficulty under which it had been drawn under that litigation?

A. Yes, sir; so considered by them and myself.

Q. Do you know anything about why it was the delay occurred in suing out the writ of error in that case to the Supreme Court?

A. Yes, sir. Judge Voorhies was the attorney of the company in that case and I instructed him to take a writ of error, and I understand he had done so. I was away. I went to Europe and returned, and eating breakfast one day when Mr. Farrar came in and he said, "You might have won that case before the Supreme Court of the United States, but I did not take any writ of error." I said,

"Yes, I did," and he says, "No, you did not," and we went up in his office and he showed me the annual, and I went around and found Judge Voorhies had not taken it, and I instructed Mr.
175 Blanc to have it taken at once, in time. Judge Voorhies severed his connection with the company as the paid or regularly employed attorney of the company, but was paid a fee in all these cases for subsequently conducting them.

Q. About how long, as you remember it, after the decree of the Supreme Court in the case was it before you gave this direction?

A. Immediately, immediately. It was so understood. When I said to Mr. Blanc, "Mr. Farrar tells me there has been no writ of error taken," and he says, "Impossible, impossible; Judge Voorhies had attended to it," and he went over his books to see if he had done so; and he said, "I am almost confident of it;" and he went off and stated he would draw it up the next day, and he did, and went down and presented it.

Q. And that is the way it came to be delayed so long?

A. Yes, sir.

Q. What relation did Mr. Gardiner hold to the company, and what duties did he attend to from the time he first came into the company's employ up to the time he resigned the superintendency?

A. Secretary and treasurer.

Q. What duties, if any, did he attend to besides those?

A. Well, he frequently went with me out around the works. It was not a part of his duties at all, but frequently he did it.

Q. To what extent, if any, was he familiar with the operation of the water works as a system?

A. Perfectly; from the date of his first entry into the service of the company.

Cross-examination waived.

176 L. H. GARDNER, sworn on behalf of the defendant, says:

Direct examination by Mr. BECKWITH:

Q. What is your age and your occupation?

A. I am fifty-two years of age; I am superintendent of the New Orleans Water Works Company.

Q. How long have you been connected with the water-works Co.?

A. Since July, 1882.

Q. What relation has that date to the time when Mr. Toby's administration ceased?

A. His administration ceased, I think, with July of that year. I was elected secretary at the organization of the board which succeeded his administration.

Q. About how long after the board succeeding the management of Mr. Toby took charge before you became connected with the company by this election? Can you fix it?

A. I think it is a month or so.

Q. What duties did you have assigned to you, or what duties did you perform in relation to the water-works company?

A. I was secretary and kept the books of the company; paid its bills, and I also assisted Mr. Houston in a general way, as far as I could, in his duties as superintendent.

Q. Did that lead you to any knowledge of the pumping works or mechanism of the company at that time?

A. To some extent.

Q. Did it give you any means of observation or knowledge
177 as to the pressure carried on the mains at the time the Toby administration went out?

A. Yes, sir.

Q. Well, what did you find there, as to the pressure, when this new board took possession?

A. The pressure at the time that I entered the office was somewhere in the neighborhood of forty to forty-five.

Q. How long did the new administration carry that pressure at that height?

A. Well, for some months; some months.

Q. Do you remember when there was the first material and intentional advance of the pressure?

A. As near as I now recollect, it was in the latter part of 1882 or in the early part of 1883.

Q. How much increase in pressure in feet column was there at that time?

A. I think about ten feet; say 7 to 10 feet.

Q. Do you remember the occasion or inducement for increasing the pressure?

A. I do; and it is for that reason that I am able to speak of what the pressure was as shown by the gauge in the office at that time.

Q. What was it?

A. H. & B. Beer were erecting or proposed to erect an elevator and complained that the pressure as shown by the gauge was entirely inadequate.

Q. You mean a water elevator?

178 A. Yes; a hydraulic elevator; and Mr. Houston agreed to increase the pressure.

By the COURT:

Q. When was that?

A. In the latter part of 1882 or in the early part of 1883, as well as my memory serves me.

By Mr. BECKWITH:

Q. And that gave you a column of about how many feet pressure equal to a column?

A. I should say about 50. I think we raised it from about forty-three to about 50. Since then it has been increased.

Q. The private service connections leading from the mains of the company to the consumers are a part of the property of the consumers and not a part of the system?

A. Yes, sir.

Q. What effect, if any, did this increase that you speak of have upon either the mains of the company or the private service?

A. The immediate effect—I don't know that I can recollect that there was an immediate effect upon the first, but there was immediately after. In other words, when our pressure got to about 55 there was considerable complaint.

Q. Complaint of what?

A. From private householders; and I had occasion to complain myself. I had a good many leaks and breaks in the pipes to mend.

Q. Well, it found its expression in a test of the strength of
179 the mains and the service to bear that pressure?

A. Yes, sir.

Q. To what extent, if any, did the mains of the company respond to that increase of pressure; how did it exhibit—too much?

A. Yes, sir; there were several breakages.

Q. To what extent, if any, was there trouble with the private service?

A. It was marked.

Q. When was the next increase of pressure as a regular system of increased pressure?

A. I am unable to say definitely. I can only answer in a general way that the pressure had been increased gradually from the time I speak of—the latter part of 1882 or early part of 1883 up to the present time—from 43 or 45 lead up to 60, where it is now carried.

Q. At what pressure in feet has it been since the date of this contract in dispute here—in January, 1884?

A. Averaged 60.

Q. What effect, if any, on the amount of water delivered through water plugs, hydrants, and water wells in increased pressure in the works—increased or diminished the amount in a given aperture?

A. Increased the amount delivered.

Q. What is the internal size of the average street hydrant for five-plug delivery?

A. The nozzle affords from 2 to $2\frac{1}{2}$ inches in internal diameter.

180 Q. What would be the difference in delivery in ratio through such a nozzle at fifteen feet between 5 feet steady pressure and 60 or 62 feet steady pressure?

A. The delivery at the lower lead, of course, would be very much lower than the delivery at the higher lead, but I have never made a calculation to ascertain what the difference would be.

Q. In your opinion, would it be trifling or considerable?

A. Considerable.

Q. Do you know anything of the number of hydrants and fire-plugs that were in existence and located prior to January 1, 1884?

A. Fire-hydrants?

Q. I mean fire-plugs or fire-wells or anything that was adapted or intended to supply water for flushing gutters or for fires.

A. 1,191, I think.

Q. 1,191 when—in 1884?

A. In 1884.

Q. Do you now refer to points where a connection can be made either for fires or for flushing gutters?

A. Yes, sir.

Q. Has that number been increased any since this contract went into existence?

A. Perhaps to the extent of five or six; not more than that.

Q. Do you know anything or can you estimate in any way, from your connection with the management of the water works, about what the pipe supply was to public buildings and institutions prior to this contract?

181 A. No; not without refreshing my memory. In the matter of a statement that I have made in a tax case before Judge Monroe I gave evidence, but I could not repeat it now without refreshing my memory by referring to that testimony.

Q. Well, the continued demand then and the demand now, has it increased or diminished since this contract was made—the supply?

A. The contract with the city?

Q. When I refer to the contract I mean the contract with the city.

A. It has increased, but I am not able to say to what extent it has increased since the contract was made.

Q. When you became connected with the water works did you find among the archives of the water works any of the city archives or records relative to the administration of the water works during the time the city chartered them or owned them?

A. I did.

Q. Will you look at the report that I marked def't "C" and state whether that report of Edwards was among the archives turned over by the city?

A. I found this report there turned over in the office.

Q. Are you familiar with that report?

A. I read it with more or less care.

Q. Have you read the estimate made by the city of the value and expense of the public water supply?

A. I have.

182 Q. You say you have?

A. I have.

Q. In your opinion has the supply or public requirements for water increased or diminished since the date of that report?

A. It has very largely increased.

Q. What is your estimate or opinion as to whether the value or cost of furnishing that public supply has increased or diminished since the date of the Edwards report?

A. The value has increased, because the amount of water furnished has been increased.

Q. What is your opinion or belief as to the correctness of the estimate made in Mr. Edwards' report as to the value of the water supply? Do you think it was overstated or understated or unfair?

A. I have no means of knowing. The price which he means here at ten cents per one thousand gallons is certainly a very low price.

Q. Mr. Golding has held several kinds of relations to the company, so far as his sentiment is concerned?

Counsel for the plaintiffs objects. The court overrules the objection. Counsel for the plaintiffs reserves a bill of exceptions to the ruling of the court.

A. I answer that question with some little hesitancy. Mr. Golding was at one time in my personal confidence and high
183 esteem of the president of the water-works Co. He took offence at the course that was pursued and left the employment of the company, and since then he has been very bitter in his denunciations of the company. Further than that I do not care to answer.

Q. You heard his testimony here the other day?

A. Yes, sir.

Q. Did you hear his testimony in relation to the condition of the water works at the time that the administration that followed Toby came in?

A. I heard Mr. Golding testify as to the pressure and the general system of pumping.

Q. Do you know of the N. pump that he spoke of?

A. I do.

Q. When was that added to the plant?

A. In the early part of the history of this company.

Q. Soon after the transfer to the city?

A. By the city to this company.

Q. About what is the capacity of that pump for pumping water at the average stage of water in the river?

A. It is difficult to say, though I think I am safe in saying that its capacity is about five million gallons. It is supposed to be more, but I take it at that.

Q. That is in twenty-four hours?

A. Yes, sir.

Q. That is the pump that the city did not have?

A. Bought and erected by this company, the New Orleans Water Works Co.

184 Q. What is its function, office, or use in the system of pumping water there?

A. It is a pumping engine.

Q. I understand it is one of three pumping engines?

A. Yes, sir; one of three pumping engines.

Q. What was the distance of its location? Was it to guard against an accident of any kind?

A. It is for safety. It is added to the other engines for supplying the city.

Q. It is so arranged unconnected with the city mains and delivery through the city that in case of a large conflagration or an extra call for water it could be added to the other pumps?

A. Undoubtedly.

Q. To what extent, if any, has the water works as an entire plant been extended in the way of mains since this company took possession of it?

A. It has laid about 20 miles of pipe, varying in size from three inches to 48 inches. It has established about 100 new fire-plugs and some five or six more fire-wells. It has put into thorough repair the engines and bought this new pump, the end pump. It has erected new boilers, erected a stand-pipe, and did other things, expending about four hundred and thirteen thousand dollars ($413,000.00) up to this time.

Q. To what extent, if any, have those new mains increased the area of the mains or delivery in the city?

A. Approximately, 18 or 20 miles.

185 Q. There has been a large main laid from the works down to Esplanade street, has there not?

A. Yes, sir; through Camp and Chartres Sts.

Q. What is the size of that?

A. 30 inches. I think it is 30 inches.

Q. It is of various sizes, is it not?

A. No. The main you speak of runs down through Camp street.

Q. To what extent does that main operate as a reservoir for sudden use in case of a fire on the line?

A. To the amout of its internal capacity. I don't exactly understand the question, but the pipe was laid as a feeder for the lower part of the city. It is a reinforced main. Prior to the laying of that main I have personal knowledge of the ability of the water supply in the lower part of the city, and this main was a feeder, reinforcing the smaller pipes.

Q. Well, so far as its flow of water, at any time it would be an additional supply of water for extinguishing fires, would it not?

A. Certainly.

Q. To what extent, if any, if you can tell, has the demand for the supply of water in asylums, charitable institutions, and public buildings increased since the date of this contract?

A. Well, there are some two or three charitable institutions that have been put upon the free list since this contract was entered into, but I don't now recall which they are. One more recently

186 of these is the St. Elizabeth Society, of Napoleon avenue. I don't recall the others, but I know there are several.

Cross-examined by Mr. FARRAR:

Q. The plaintiffs have offered in evidence ten annual reports of the New Orleans Water Works Co., from 1879 to 1888. Are those reports true?

A. As far as I know they are.

Q. They are true and correct?

A. As far as I know; yes, sir.

Q. All of these reports since the report of April 10, 1882, have been made up by you, have they not, or under your supervision as secretary and superintendent?

A. I have edited them altogether.

Q. And the data and statements contained in these reports since the report of April 10, 1882, have gone through your hands?

A. All of them.

Q. Mr. Beckwith asked you just now with reference to the extension of the mains and pipes and the N. pump and the improvements and repairing of the plant, and so forth. When were these improvements made, and when was that N. pump put up, and where were these extensive changes and improvements in the works made? Between what years?

A. At the beginning of the year 1879 and up to that date.

Q. When was the N. pump bought?

A. In the early part of the history of this company. I don't know. Before my connection.

Q. When were these improvements laid down on Camp street?

A. In the——

187 Q. You say these reports show the mains layed that year?

A. Yes, sir.

Q. Don't they show the number of hydrants that were established each year?

A. No, sir.

Q. In the report for 1887 there is a statement of the location of every fire-plug and main in the city of New Orleans, and blow-off. Is not that true?

A. It is, but that does not say when they were established. Your question was when were they established. The reports don't show when those fire-wells were established. That is a list of them up to that date and their location, but those reports do not state when those fire-hydrants or fire-wells were put in. I know it, for I wanted to get some information on that subject myself, but could not find it in Mr. Toby's reports.

Q. Can you furnish me with a statement in detail from the books of your company the number of miles of main layed in the city of New Orleans in new territory since the first day of January, 1884?

A. You have it there before you in those reports. It is all there.

Q. If you have layed any new mains in this territory it is in these reports?

A. Yes, sir.

Q. If you have established any new fire-wells they are in these reports?

A. Yes, sir.

188 & 189 Q. Can you furnish me with a statement of the number of new hydrants and the locality of the new hydrants that have been established by this company since the 1st of January, 1884?

A. Yes, sir; I think so.

Q. How many do you think?

A. I suppose half a dozen.

Q. Where were they established—In old localities or new localities?

A. Three of them placed on St. Charles avenue between 6th and 8th streets. One of them was placed on, I think, Laurel street near Jackson. I do not recollect the exact location.

Q. Have you established any new fire-wells since January 1, 1884?

A. No, sir.

Q. What was the cause of the establishment of those new fire-plugs? Was it not due to the extension of the mains on the streets on which they were established in consequence of the demand of private consumers on the street, under your charter?

A. No, sir. Three of them were put down, without any remuneration at all by the city to the company, at the request, I think, of Chief O'Connor. They were put down without any expense to the city.

Q. Does not your charter require that wherever there is an investment, an interest is guaranteed upon the water supply, that you are obliged to lay the mains down upon the street at your own cost?

A. Yes, sir. Wherever a revenue is guaranteed of ten per cent.

of the expense the company is required to extend its mains,

190 and has always done so.

Q. You know nothing whatever about the water-works company prior to your connection therewith, in 1882?

A. Nothing but what I got from the books and records.

Q. You say that there has been an increase in the water made to charitable institutions since making this contract, in 1884. How do you know that?

A. Well, by my personal attention to my business. I am superintendent of the company. It could not be delivered unless I said so.

Q. How do you know that any of the charitable institutions were using more water prior to that date than subsequently?

A. I did not say that.

Q. Take any charitable institution and state whether or not that institution, within your knowledge, uses more water now than it did then; and, if so, why?

A. I did not state so.

Q. Then there has been no increase by the charitable institutions which were supplied with water in the manner in which they use water?

A. I have no reason to suppose that the institutions being furnished with water on the 1 of January, 1884, were using more or less water.

Q. What do you mean by "increased use by charitable institutions?"

A. I mean to say 25 public buildings and charitable institutions are being supplied with water free that were not supplied at that time.

191 Q. What public buildings and what charitable institutions? Name them.

A. Touro Infirmary, on Prytania near Foucher street.

Q. What is the Touro Infirmary?

A. It is a Jewish charitable institution.

Q. For what purpose.

A. Hospital.

Q. Public hospital?

A. Yes, sir; the Little Sisters of the Poor.

Q. What are the Little Sisters of the Poor.

A. Charitable asylum.

Q. Under whose auspices?

A. Sisters of Mercy, I believe they are called.

Q. Under the auspices of the Catholic Church for aged and infirm persons?

A. I believe so. Fink's Asylum, near the corner of Camp and Chestnut Sts.

Q. What is the Fink Asylum?

A. The Fink Asylum, I think, is an asylum for destitute poor. The Episcopal Home, on Jackson between Fulton and Chippewa streets.

Q. What is that?

A. An orphan asylum. St. Joseph's Asylum, on Laurel between St. Andrew and Josephine streets.

Q. What is that?

A. Just what its name calls for—an orphan asylum. Jefferson Fire Co. No. 22.

Q. To whom does the building belong?

192 A. I don't know, sir.

Q. Is it part of the fire department of the city of New Orleans?

A. I presume so.

Q. Don't you know so?

A. I do not.

Q. Stop, Mr. Gardner. You know that. Don't answer that way; you simply injure your testimony.

A. I do not, I say. I don't know whether the building belongs to the city or not.

Q. I ask you if that is not a part of the fire department of the city of New Orleans?

A. Yes, sir.

Q. That is what you mean?

A. Yes, sir. Philips' Fire Co.

Q. Is that a part of the fire department?

A. Yes, sir. The St. Elizabeth Asylum, Napoleon avenue and Prytania Sts.

Q. Protector Fire Co. No 2, what is that?

A. Fire department.

Q. Part of the fire department of the city of New Orleans?

A. Yes, sir. Seventh Street Orphan Home, Margaret monument.

Q. What is that? That is a public square, is it not?

A. Yes, sir.

Q. And that is a public ornament or fountain in the square?

A. Yes, sir. Public High School, No. 144, Clio street.

193 Q. That is the Girls' High School of the city of New Orleans, is it not?

A. I don't know whether it is the Girls' or Boys' High School. McDonogh School, corner of Rampart and Gird streets.

Q. One of the public schools of the city of New Orleans, is it not?

A. Yes, sir. Carmelite Home, on Common, between Magnolia and Locust streets.

Q. What is that—Home for the Indigent?

A. I can't say exactly, but it is a charitable institution. The McDonogh School, corner of Prieur and Palmyra Sts.

Q. Part of the public-school system of the city of New Orleans?

A. Yes, sir. The ambulance.

Q. Part of the Charity Hospital?

A. Yes, sir. The Newsboys' Home.

Q. A charitable institution for newsboys?

A. Yes, sir. Washington School.

Q. A public school of the city of New Orleans, is it not?

A. Yes, sir. Congo square.

Q. Another public square?

A. Yes, sir. St. Vincent's Orphan Asylum.

Q. An asylum for infant children, is it not?

A. Yes, sir. McDonogh School, No. 17.

Q. Part of the public-school system of the city of New Orleans, is it not?

A. Yes, sir. Claiborne Public School.

Q. Part of the public school system of city of New Orleans,
194 is it not?

A. Yes, sir; Esplanade St. public fountain.

Q. Now, when you say that an increase of the charitable institutions has taken place under this contract you mean that water has been led since this contract has been made, including institutions thus named?

A. These institutions are now being furnished and were not furnished prior to the existence of this contract.

By the COURT:

Q. Was not the Touro Infirmary furnished?

A. It is not of record. I would have said so. I thought so. I would have said so if I had been speaking from memory. I am speaking now of the Touro Infirmary.

Q. I ask you whether or not water was furnished to the Touro at its old location before they moved into the new place?

A. That I can't say.

By Mr. FARRAR:

Q. Do I understand you to say that none of the parties that you have named in the list had water furnished them by the company prior to the making of the contract of 1884?

A. No, no. These institutions there are furnished by this company, and had not previously been supplied by the city of New Orleans.

Q. Then, what I understand is, water has been led to these institutions since this contract was made, and was not led there prior to the making of this contract?

A. Not at all. It is not what I said. These institutions,
195 the list of which I have given you, are not furnished with water, and were not furnished with water by the city of New

Orleans. There have been added to the free list of the company since the company took hold of the water works.

Q. Or since this contract was made?

A. Since the company took hold of the water works.

Q. I desire you to give your testimony with reference to the contract which was made in September, 1884. I ask you what was the condition of the institutions that you have there named prior to the 27th of September, 1884?

A. I am not able to tell you. I can't tell you the date at which the water was turned on any of these.

Q. I ask you for a list of the charitable institutions which have been added to the free list since the making of the contract attacked in this case—that is, since September, 1884.

A. That I am unable to give you. I am not prepared to give it to you.

Q. So far as you know, those whom you name there were all on the list prior to September, 1884?

A. No, sir; I have not stated that, I say. I say that none of them were on the free list on the 1st day of January, 1879, if that will make it any clearer.

Q. We are not dealing with anything that happened on the 1st of January, 1879. You have testified here that there has been an increase in the consumption of water by the public charitable institutions of the city of New Orleans since September, 1884.

196 A. Very well.

Q. Have you not?

A. Yes, sir.

Q. Now, I ask you how you were able to say that there had been any increase from 1884 to 1888 as compared with the period from 1879 to 1884.

A. For the reason that I know in a general way that there have been additions made to the free list since that time. I am not able to accurately tell you what they were, and I stated that one of the notable cases—the most recent connection—was the St. Elizabeth Asylum.

Q. Then you are unable to state what additions have been made to the free list since September, 1884?

A. I am unable to so state.

Q. Except the St. Elizabeth Asylum?

A. Yes, sir.

Q. If you are unable to state what additions have been made to the free list since 1884 how are you able to testify that there has been an increase in the consumption of water?

A. Well, that single institution calls for an increase of the consumption of water.

Q. Then, so far as you know accurately and of your own knowledge, you are not able to testify that there has been any increase except the increased consumption of that certain institution?

A. No, sir; I have not stated that; I said there is a further
197 and a larger increase in that particular institution, but I am not able now to tell you accurately when the water was turned

on, but there has been additions since the date of this contract, but I am unable to give you the locations.

Q. Then I again put the question to you: If you are unable to state what additions to the free list have been made since that time how are you able to state there is a material increase in the consumption of water since that time?

A. It is matter of general knowledge. It is a mere matter of——

Q. Then I know it as well as you do, if it is a matter of general knowledge.

A. Well, maybe so.

By Mr. BECKWITH:

Q. What is the capacity of the present pump, device, or engineering of the water-works company to deliver *in* millon gallons per day if they were taxed to the utmost, of fire tax?

A. Well, I should say, at a very moderate calculation, thirty millions; but it would be over thirty millions.

Q. What is the average daily consumption of water now, and has it been since 1884? State approximately.

A. Seven or eight millions.

Q. Then the engines have a capacity for much more than they are called upon to do now, or that the water supply for the water-works purposes calls for?

A. Yes, sir.

By Mr. FARRAR:

Q. What is the capacity of the pumps that are being used to supply the city with water?

198 A. Ten millions.

Q. What is the capacity of the large pump that is not used except occasionally, on the upper side of the water works?

A. Well, when I said thirty millions I am placing that pump at five millions and the N. pump at five millions and the double large engine at twenty millions.

Q. The double large engine is not used?

A. Constantly.

Q. But it is not used to its full capacity?

A. No, sir.

Q. When was that large engine put up?

A. Some 20-odd years ago.

Q. It was put up in 1860, was it not? Was it not built by the Novelty iron works in 1858?

A. I think 1860 is the date; that is the date of the plate on the engine, I think.

Q. Your reports say since 1860.

A. I think so.

Q. And the smaller pumping engines were built in 1847, were they not?

A. 1847 and 1848.

Q. And they have been in operation there since 1848?

A. Yes, sir; the small pumping engines.

Q. You mean the engine farthest uptown, the capacity of which you place at five million gallons?

A. Yes, sir; for the purpose of answering your question conservatively, but I think it will take more than five millions.

199 Q. But the N. pump, as shown in this report, has a capacity of five million gallons?

A. Yes, sir; for the purpose of answering your question conservatively, I say five millions, but I think it has a capacity of more than that.

Q. How often is that engine used?

A. It is not used frequently, but whenever repairs are going on the large engine is used in connection with the old engine.

Q. In other words, the old engine and the N. pump are used to rest the big pump?

A. Yes, sir.

Evidence closed and case fixed for argument Jan'y 30th, 1889.

Answer of N. O. Water Works Co. under Order of Court to Eject. Filed January 16th, 1889.

Civil District Court for the Parish of Orleans.

E. CONERY, Jr., *et al.*
vs.
THE N. O. WATER WORKS CO. } No. 15774.

The court having, on the motion of E. H. Farrar, Esq., attorney for E. Conery, Jr., *et als.*, tax-paying plaintiffs, made the following order in this cause, which is of record, as follows: "The court therefore thinks that the defendant ought to be required to elect, first, whether it stands upon the position that act 56 of 1884 is

200 operative as to its rights and obligations under its charter and under the contract which is attacked in this case, and whether it has accepted or has not accepted such act of the Legislature in such manner as to be bound by its conditions; second, whether it relies upon said act 56 of 1884 as material to the validity of the contract attacked or not."

Now, therefore, by compulsion and not of their free will, but at all times excepting to said order and insisting that the defendant, The New Orleans Water Works Company, ought not to be so compelled to elect the law to be applied to the controversy involved in this suit, and that it is not and will not be bound by such election in any other court or tribunal that may hereafter acquire jurisdiction of this cause, by appeal or otherwise, nor in any other cause to which this defendant may be or become a party, through its undersigned counsel, in this court and in and for no other court or tribunal whatsoever, says:

First. That as to and concerning the first distinct matter or proposition stated in the first subdivision of said order, to wit, "Whether it stands upon the position that act 56 of 1884 is operative as to its

rights and obligations under the charter," this defendant elects and believes the law to be that said act 56 is valid and lawful legislation and in force in this State with such force, effect, and construction as in law it ought to have, and that being a part of the — land this defendant ought to rely thereon, if it contains any provisions
201 affecting this controversy, to the same extent as it may lawfully rely on all other laws of the land affecting this controversy or the validity of the contract attacked in this suit and is of any force or effect or of any advantage to this defendant in that respect and behalf.

Second. That as to and concerning the inquiry next in order propounded in said first paragraph of said order, whether said act 56 of 1884 "is operative as to its rights and obligations under its charter," said counsel say that after careful consideration and consultation they are left uncertain as to the exact range and meaning of said inquiry and order in this respect and particular or concerning what exact matter they are by said inquiry called upon to elect, but construe the same to compel this defendant to elect whether said act 56 of 1884, if it is valid, has the effect in law to remit any forfeiture of defendant's charter, or to "renew, alter, or amend the same, or is in law a general or special law for the benefit" of the said defendant as a corporation in any sense considered in act 234 of the present constitution of this State, or whether said act by its adoption put any limitation on the rights or franchises of the defendant not in operation or effect before its adoption. It is the election of this defendant that in law the adoption of said act 56 had no effect
202 whatsoever on the defendant's charter, either in form or by effect of law, and could in no event have such effect while defendant's charter as a contract is under the protection of the first article of the Constitution of the United States.

Third. That as to and concerning the third inquiry in order as set forth in the said first paragraph of said order, to wit, whether said act 56 of 1884 is operative to affect the rights of said defendant under the contract which is attacked in this case, said defendant elects the law to be that both the city of New Orleans, through its legislative and executive departments, and the New Orleans Water Works Company, through its board of directors, had full and competent power and authority under their respective charters to lawfully enter into and make the contract which is attacked in this case before said act 56 of 1884 was passed, and if that act had never existed that the adoption of said act 56 did not limit or restrict the said pre-existing power and capacity existing in either *and* both of the corporations, and claims the benefit of all the law of the land that may protect the said contract, even if it be cumulative law in character.

Fourth. That as to and concerning the fourth and last inquiry contained in said paragraph of said order, to wit, "whether it has accepted such act of the Legislature in such manner as to be bound by its conditions," said defendant elects the law to be that
203 if the said act 56 of 1884 is void for any of the vices alleged against it in plaintiffs' petition there could be no acceptance

by this defendant or any corporation that would have any effect in law, and if the plaintiff's petition is false in law and the act valid, "petition" to the contrary notwithstanding, the said act does not by its text impose on the New Orleans Water Works Company a single condition of any character or description; but if the act imposes conditions of any kind on any one, such conditions are imposed on the city of New Orleans and not on the defendant.

Fifth. That as to and concerning the second or last paragraph in said order, to wit, whether it relies upon said act 56 of 1884 as material to the validity of the contract attacked or not, said defendant elects and will maintain that the contract attacked would in law be binding and valid if act 56 of 1884 had never been adopted; that if said act 56 had or has any effect on the rights of the parties to the contract to make the contract it is cumulative with pre-existing laws that fully warrant*ing* the contract and was neither indispensable to the binding effect of the contract nor any limitation upon the pre-existing power of either *power* to make the contract, and that act 56 was immaterial to the validity of the contract only in the sense that the contract would have been valid without the operation of act 56 of the acts of 1884 referred to in said order.

204 That whether the act of the board of directors of the defendant company in joining in the contract attacked in the suit is an acceptance of the said act 56 of the acts of 1884 is a question of law, and if material to any lawful issue in this cause is put at issue herein by the general denial pleaded herein, and insists that upon that question of law, as well as upon all others of said matters of law above stated, this defendant is entitled to a trial by the courts in due and regular form, not affected by this compulsory election under the compulsory order of the court as aforesaid.

(Signed) J. R. BECKWITH,
GUS A. BREAUX,
HARRY H. HALL,
Of Counsel.

Document Marked "A A." Certificate of MacMurdo, Sec'y N. O. Water Works Co., of Taxes Paid to the City of N. O. Offered in Evidence by Plaintiffs and Filed Jan'y 7th, 1889.

Taxes paid by N. O. Water Works Co. to city of New Orleans.

1885.		
Oct. 19th.	Cash paid this date	$20,619 37
1886.		
Oct. 14th.	"	22,093 59
1887.		
Sept. 3.	"	20,113 60
1888.		
Sept. 4.	Cash paid this date	21,405 78
		$84,232 34

I hereby certify that the above is a correct transcript from the books of this company.

(Signed) R. L. McMURDO, *Sec'y.*

[SEAL.]

205 *Document Marked "B." Certificate from the Books of the N. O. Water Works Co. of Amounts Rec'd from City of N. O. Offered in Evidence by Pl'ffs & Filed January 7th,* 1889.

Amounts rec'd from city of New Orleans.

1885.				
Feb'y	18.	By cash rec'd	$5,695	
M'ch	3.	"	5,695	
Ap'l	2.	"	5,695	
May	8.	"	5,695	
June	1.	"	5,695	
July	16.	"	5,695	
Aug.	5.	"	5,695	
Sept.	17.	"	5,695	
Oct.	6.	"	5,695	
Nov.	4.	"	5,695	
Dec.	3	"	5,695	
1886.				
Jan'y	27.	"	1,594	60
Feb.	2.	"	5,695	
M'ch	3.	"	5,695	
	31.	"	5,695	
May	13.	"	5,695	
June	2.	"	5,695	
July	7.	"	5,695	
Aug.	6.	"	6,695	
Sept.	22.	"	6,695	

206 Amounts rec'd from city of New Orleans.

Oct.	16.	By cash rec'd	5,695	
Nov'r	10.	"	5,695	
Dec.	17.	"	5,695	
"	—.	"	1,594	60
1887.				
F'b'y	14.	"	5,695	
M'ch	9.	"	5,695	
Ap'l	7.	"	5,695	
May	7.	"	5,695	
	30.	"	5,695	
July	2.	"	5,695	
Aug.	4.	"	5,695	
Sept.	3.	"	5,695	
Oct.	3.	"	5,695	
Nov.	14.	"	5,695	
Dec.	7.	"	5,695	

1888.				
M'ch	6.	By cash rec'd		5,705
Feb.	18.	"		5,695
				$202,524 60
M'ch	7.	"		1,594 60
Ap'l	6.	"		5,700
June	6.	"		5,700
"	6.	"		5,700
July	7.	"		5,700
Jul-	30.	"		5,700
Aug.	31.	"		5,700
Sept.	29.	"		5,700
Oct.	31.	"		5,700
Dec.	14.	"		5,700
				$255,419 20

(Over.)

207 I hereby certify that the above is a correct transcript from the books of the company.

(Signed) R. L. McMURDO, *Sec'y.* [SEAL.]

Document Marked "C" and "C 1." Certified Copies from the Minutes of the N. O. Water Works Co. of a Special Meeting Held on Sept. 27th, 1884, and Called Meeting Held Nov'r 11th, 1884. Offered in Evidence by Pl'ffs. Filed January 7, 1889.

Copy.

Special meeting.

SATURDAY, *Sept. 27th*, 1884.

Present: Messrs. A. Baldwin, J. D. Houston, H'y Abraham, and Hon. I. W. Patton.

The minutes of the previous meeting were read and approved.

Communications from Mr. H. C. Miller, att'y for board of liquidation, were read, demanding payment to him of the dividends standing *at* the credit of the city of New Orleans on the books of this company.

On motion of Mr. Houston, the secretary was instructed to answer Mr. Miller, refusing payment unless the city secures a release of the various seizures and garnishments to which this company has been made a party in the matter of these dividends.

A communication from Mr. Golding, asking permission to attach his new steam-engine for trial to the old engine of the company, free of charge, was laid over until next meeting.

The following preamble and resolutions were offered by Mr. Houston, seconded by Mr. Abraham, and adopted:

208 Whereas ordinance No. 909, council series, adopted by the council of the city of New Orleans on September 23rd, 1884,

has been promulgated and is now before this board for acceptance, and to be a contract between the said New Orleans Water Works Company and the city of New Orleans during the term of the charter of said company: Therefore,

1st. Be it resolved, That this the board of directors of said New Orleans Water Works Company do hereby accept the terms and provisions and conditions of said ordinance No. 909, council series, all and singular, and as adopted and approved and promulgated and as written, in words and figures following, to wit: (Printed copy of ordinance here attached.)

2nd. Be it further resolved, That said ordinance is hereby accepted as above stated, to be and constitute a contract and agreement between said city of New Orleans and the New Orleans Water Works Company during the term and period of the charter of said company, and the president of the said N. O. Water Works Company be, and is hereby, authorized and directed to enter into and execute a notarial act of contract with the city of New Orleans, through its mayor, embodying said ordinance and to carry out the same and these resolutions.

Mr. Houston stated to the board his inability to give to the details of the affairs of the company attention satisfactory to himself, and moved the creation of the office of superintendent of the
209 company. The motion being adopted, he nominated L. H. Gardiner, who was elected to the position and his salary fixed at $3,600 per annum. Mr. Gardiner tendered his resignation as secretary, and Mr. Houston nominated R. L. McMurdo to succeed him, at a salary of $2,400 per annum.

On motion, Mr. McMurdo was thereupon elected secretary of the company.

On motion, the board adjourned.

(Signed) L. H. GARDINER, *Sec'ty.*

I certify that the above is a true copy from the minute book of the company.

(Signed) R. L. McMURDO, *Sec'ty.* [SEAL.]

Copy.

Called meeting.

TUESDAY, *Nov.* 11, 1884.

Present: Messrs. A. Baldwin, pres't; J. D. Houston, H'y Abraham, and Hon. I. W. Patton.

The minutes of the last meeting were read and adopted.

The secretary submitted full statements of the affairs of the company. The superintendent submitted his report.

Mr. Houston moved, seconded by Mr. Abraham and carried, that the suit brought by Thos. Killein against this company be defended and arrangement be made by the superintendent with Judge J. R. Beckwith as to his fee.

Motion was made by Mr. Houston, and carried, that in the suit brought by the board of liquidation of the city of New Orleans

against this company for dividend standing in the name and to the credit of the city it be referred to Judge Beckwith, and the
210 superintendent empowered to arrange with him as to fee. On motion, which was adopted, the assessment of $650 for water supply furnished the New Orleans Gas-Light Company was ordered to be revised by our inspector and an inspector to be appointed by the gas Co. On motion of Mr. Houston, which was adopted, $2,500 was ordered to be paid to Mr. S. P. Blanc on account of his fee for legal services rendered in State courts, in supreme court of the State, and in the city council in case of city ordinance No. 909, council series, dated Sept. 25, 1884. On motion, the bond of R. L. McMurdo, as secretary and treasurer of this company, was accepted and handed to the president for safe keeping. Mr. Abraham moved, and it was carried, that Mr. Gardiner be refunded $435 for his expenses to St. Louis, incurred in making clarification test on basins in that city in August last. There being no further business, the board, on motion, adjourned.

(Signed) R. L. McMURDO, *Sec'ty.*

I certify that the above is a true — from the minute book of the company.

[SEAL.] (Signed) R. L. McMURDO, *Sec'ty.*

Document Marked "D." Receipts of the Daily States from Receipt Book of the N. O. Water Works Co. Offered by Pl'ff and Copy Filed January 7th, 1889.

NEW ORLEANS, *May 5th*, 1884.

Received from N. O. Water Works Co fourteen & $\frac{25}{100}$ dollars, as per bill rendered.

$14.25 (Signed) DAILY STATES PRIT. CO.,
Per CARROLL.

211 $2.25 of this am't was for advertising div'd payable Ap'l 10, 1884.

$12, " "
notice of legislative act.

I certify that the above is a true copy from the receipt book of this company.

(Signed) R. L. McMURDO, *Sec'ty.* [SEAL.]

Copy.

N. O., *Nov. 14th*, 1884.

Received from N. O. Water Works Co. twenty-five hundred dollars.

$2,500. (Signed) SAM'L P. BLANC,
(Signed) Pp. JNO. J. HANOVER.

I certify that the above is a true copy from the receipt book of this company.

(Signed) R. L. McMURDO, *Sec'l'y.* [SEAL.]

Copy.

NEW ORLEANS, *May 28th,* 1885.

Received of N. O. Water Works Co. twenty-five hundred dollars, being balance of fee in matters of N. O. Water Works Co. *vs.* The City of N. O., and of the City *vs.* The Co., in relation to payment for water supply and tax claims, said payment to cover future services needed to complete adjustment and settlement of claims for city taxes and payment for water supplied in the past.

(Signed) SAM'L P. BLANC.

I certify that the above is a true copy from the receipt book of this company.

(Signed) R. L. McMURDO, *Sec'l'y.* [SEAL.]

212 *Document Marked "F." Contract Between the City of N. O. and the N. O. Water Works Co., Before J. P. Taylor, N. P. Offered by Pl'ffs and Filed January 7th,* 1889.

UNITED STATES OF AMERICA,
State of Louisiana, Parish of Orleans, City of New Orleans:

Be it known that on this third day of the month of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and ninth, before me, Joseph Dewey Taylor, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and official notary of the city of New Orleans, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared the Hon. Joseph Valsin Guillotte, mayor of the city of New Orleans, herein acting in his official capacity as mayor aforesaid, being herein and hereunto specially authorized and empowered by ordinance No. 909, council series, adopted by the council of the city of New Orleans on the 23rd day of September, A. D. 1884, a duly certified copy of which ordinance is hereto annexed and made part hereof.

Also came and appeared Mr. Albert Baldwin, president of and herein representing the New Orleans Water Works Company, being herein and hereunto specially authorized and empowered by
213 a resolution of the board of directors of said water-works company passed at a meeting of said board held in the city of New Orleans on the 27th day of September, A. D. 1884, a certified copy of which resolution is hereto annexed and made part hereof.

Whereupon said Albert Baldwin, in his said capacity as president, declared, and does hereby declare, that he accepts all and singular the terms, conditions, provisions, obligations, rights, benefits, and advantages set forth and contained in said ordinance No. 909, adopted

by the council of the city of New Orleans on the 23rd day of September, A. D. 1884, and approved by the mayor on the 26th day of September, A. D. 1884, thereupon duly promulgated, and which said ordinance so accepted by said Baldwin, president, is in the words and figures following, to wit:

An ordinance to carry out act No. 56 of the acts of 1884, providing for a future water supply from the New Orleans Water Works Company to and for the city of New Orleans and certain institutions, and regulating the use of water and the payment thereof.

Whereas the city of New Orleans has been and is and will be unable to allow the New Orleans Water Works Company the fifty years' exemption from taxation, being the consideration for a free supply of water, contemplated by section 11 of act No. 33 of the acts of 1877, and the courts having decided that the exemption from municipal taxation granted in said act is not and shall not be enjoyed, and therefore, as is also decided, that the city must pay for the water supplied by said company; and

214 Whereas it is best to arrange for a fixed annual price for said water supply rather than leave the city liable to an annual demand, the amount of which cannot be known in advance and from which the city cannot be relieved, but is specially authorized and required to provide for the payment therefor; and

Whereas the said New Orleans Water Works Company is willing to accept terms arranging for a sum to be determined in advance of each year, and which amount can be readily and equitably fixed, according to a mode adopted in other cities, by reference to the number of fire-hydrants, fire-plugs, or fire-wells, now numbering eleven hundred and thirty-nine (1139), in this city: Therefore,

SECTION 1st. Be it ordained by the city council of the city of New Orleans, That during the term of the charter of the New Orleans Water Works Company, beginning with the year 1885, the supply of water for which this ordinance provides shall be furnished by the said company from the pipes and plugs of said company, now laid or hereafter to be laid, for the following purposes, to wit: For the extinguishment of fires and cleansing of the gutters, for the use of all existing public buildings, public markets, public squares, and places, public schools, and the public charitable institutions supported and to be established and supported by the State or city and now supplied by the said company, it shall be the duty of said company to keep and maintain a head or pressure of water of not less

215 than fifty feet head, between the hours of seven a. m. and six p. m.; and the reservoir supply at night and between these hours shall be of such abundance as amply to cover the needs of the fire department for extinguishing fires, and the said company shall make such provision as shall be necessary to reinforce or supplement said reservoir supply in case of need or accident. In consideration of the said supply the city of New Orleans shall pay during the term of the said company's charter to the said water-works company sixty dollars ($60.00) per annum for each and every fire-plug

fire-hydrant, and fire-well connected with the mains or pipes of said company, of which said fire-plugs, fire-hydrants, and fire-wells there are now eleven hundred and thirty-nine (1139), which number shall ever be the least measure of the annual sum to be paid to said company, and for every additional hydrant, fire-plug, or fire-well exceeding said number, hereafter attached to said pipes or mains, the city shall pay an additional sixty dollars ($60.00) per annum

SECTION 2. Be it further ordained, etc., That the city of New Orleans shall have the power in time of drouth to furnish water to such persons as may live outside the lines of pipes of said water-works company free from all charges by the same, and shall have further power by ordinance duly passed and notified in writing to said company before each annual appropriation for said supply to decrease or increase the number of fire-plugs, fire-hydrants, and fire-wells for the ensuing year, all such ordinances to designate the
216 locations for the new attachments or intended cut-offs: Provided, however, that the number of said fire-hydrants, fire-plugs, and fire-wells be not reduced below eleven hundred and thirty-nine (1139), the intent thereof being that the annual price to be paid for said water supply shall never be less than as fixed herein, by reference to the now existing number of said fire-plugs, fire-hydrants, and fire-wells; but the city expressly reserves the power to change the location of any of said fire plugs, hydrants, or wells whenever the council shall deem it necessary, said changes to be at the cost of the company.

SECTION III. Be it further ordained, etc., That the city of New Orleans shall annually set apart, appropriate, and provide in its annual budget of expenditures and receipts, beginning with those for the year 1885, and in all successive budgets for each year successively, a sum sufficient to pay for said annual water supply as fixed in the foregoing sections of this ordinance, and that said annual sum or price shall be paid to said New Orleans Water Works Company in twelve equal and monthly installments, one on the last day of each consecutive month, beginning in the month of January, 1885, for the year 1885, and beginning also in the month of January in each year thereafter; and, in event of prompt cash payments of said installments during each year, the city of New Orleans shall be entitled to deduct and retain from the last installment in each year six per centum of the entire amount paid and payable to the said company in and for said year; but should any installment be
217 unpaid when due it shall bear interest at the rate of eight per centum per annum from the end of the month in which it was payable until finally paid.

SECTION 4. Be it further ordained, etc. That it is hereby made the duty of the comptroller or auditing officer and of the treasurer of said city of New Orleans carefully to set apart and keep, as a distinct fund, the moneys or collections which shall have been appropriated in each year pursuant to this ordinance, and such proportion of all collections of the revenue as shall have been appropriated in the budgets to and for said company, or the said water supply for each year shall be carefully and exactly set apart by said officers as

collected, and shall be warranted for by said comptroller and paid by said treasurer to said company during each month without further direction, ordinance, or authority than that hereby given.

SECTION 5. Be it further ordained, etc., That the New Orleans Water Works Company shall have the right to inspect and to examine into the use of water to be supplied under this ordinance, and the city of New Orleans and its officers shall see that no water is taken or used except for the purpose aforesaid, and to this end the city of New Orleans shall adopt all proper measures or ordinances to prevent waste and to prevent any use of water except for the purposes herein designated; and it is hereby made the duty
218 of the officers of said city and of those of all public buildings and public institutions and of all persons using water under this ordinance to prevent waste and to prevent the use of such water except for the actual need for the purposes aforesaid.

SECTION 6. Be it further ordained, etc., That the mayor be, and is hereby, authorized and directed to execute a contract by notarial act to and with said company, embodying and carrying out the provisions of this ordinance.

SECTION 7. Be it further ordained, etc., that all ordinances or parts of ordinances inconsistent or in conflict with this ordinance be, and the same are hereby, repealed.

Adopted by the council of the city of New Orleans September 23, 1884.

M. McNAMARA,
Clerk of Council.

Approved September 26th, 1884.

J. V. GUILLOTTE, *Mayor.*

A true copy.

TH. BUISSON,
Secretary to the Mayor.

And said Joseph Valsin Guillotte, mayor, and said Albert Baldwin, president, having each read and declared himself fully cognizant of the contents of said ordinance, do severally declare that they do hereby contract, engage, and agree, one with the other, according to the terms, provisions, conditions, and language of said ordinance, all and singular of which said terms, conditions, provisions, and language shall be, and is hereby, made a contract, engagement, and agreement between said parties, The City of New Orleans and The New Orleans Water Works Company, to be observed and
219 carried out and held and maintained during the entire term and existence of the said New Orleans Water Works Company, its assigns or successors, as now fixed in the charter of said company, being a period of fifty years from the incorporation of said company.

The said Albert Baldwin, as president aforesaid, engages to furnish and supply water from the pipes of said company in the manner, at the times, and for all purposes and objects as set forth in and pursuant to the provisions and requirements of the said

ordinance No. 909, council series; to furnish or supply water to and for the public places, buildings, and institutions as in and by said ordinance required; to allow the city of New Orleans in time of drouth, said state or condition of drouth to be decided by the board of this company and the city council, to furnish water to such persons as may live outside the lines of the pipes of the said company for the needs of said persons without waste, and by such means of transportation by carts, wagons, barrels, or like appliances as said city may provide and furnish, all pursuant to the extent and purpose of sections second and fifth of said ordinance; to observe and obey any ordinance, duly notified to said company, directing the increase of the number of fire-plugs, fire-hydrants, and fire-wells, or the decrease thereof, provided said decrease be not below eleven hundred and thirty-nine in number, all according to section 3rd of said ordinance; and further he engages and contracts, as president aforesaid, to do, perform and give, and to observe, carry out, and fulfill all things required of said company by or in said ordinance. In consideration whereof said Joseph Valsin Guillotte, mayor aforesaid, engages and contracts to pay unto said company annually the sum of sixty ($60) dollars for each and every fire-plug, fire-hydrant, and fire-well connected with the mains or pipes of said company, of which there are now eleven hundred and thirty-nine (1,139), and which number shall ever be the least measure of the annual sum to be paid said company; to pay said company annually sixty ($60.00) dollars for every additional hydrant, fire-well, or fire-plug exceeding said number of eleven hundred and thirty-nine (1,139) and hereafter attached to said mains or pipes; to satisfy said company in writing of all decrease or increase required of said plugs, hydrants, or wells; to make promptly, fully, and specially the annual appropriations and monthly payments as required by and in section three of said ordinance, the city to deduct or retain from the last monthly payment in each year six per centum of each annual sum paid and to be paid said company, as provided in said section three; to hold and set apart and keep as a distinct fund the moneys or collections, as required by said ordinance, and, upon request or demand of said company, on the last day of each month in any year, the comptroller of the city shall warrant on the treasury for and the treasurer shall pay from said money or collections the instalment which at that time shall be due without other authority or ordinance than said ordinance, and the comptroller or auditing officer and the treasurer of the city shall faithfully carry out and promptly obey all the requirements and provisions of the fourth section of said ordinance, and shall raise no obstacle nor impose any delay in obeying the same; and it shall be the duty of each in his respective department to keep all money and collections appropriated under said ordinance and this contract as separate from all other moneys and as a distinct fund, all pursuant to and in accordance with said section 4.

220

221

The said company shall have the right to inspect and to examine into and concerning the use of water supplied by it, and none of said water shall be wasted or used otherwise than for the purposes named

in said ordinance and to the extent of the actual need for said purposes, all as provided in section five of said ordinance, and to this end the officers and persons designated in said section five and the city of New Orleans shall do, perform, and abstain from doing the things set forth in said section five of said ordinance.

Further, it is agreed, understood, and stated by and between the said parties that the specification or detailing in this instrument of the several rights, duties, obligations, and things to be done, performed, observed, carried out, or abstained from, respectively, does not and shall not limit, modify, or in any manner take from the effect of any of the terms, conditions, provisions, or expressions of said ordinance, all of which are by these presents accepted and made binding, effective, and operative upon and between the said
222 New Orleans Water Works Company and the city of New Orleans, their assigns or successions, for and during the term named in the charter of said company.

Thus done and passed, in my office, in the city of New Orleans aforesaid, the day, month, and year first aforesaid, in the presence of Charles G. Rebentisch and George B. Goetz, witnesses of lawful age, residing in this parish, who have signed their names with said parties and me, notary, after due reading of the whole.

(Original signed) J. V. GUILLOTTE, *Mayor.*
ALBERT BALDWIN,
President of the New Orleans Water Works Company.
C. G. REBENTISCH.
GEORGE B. GOETZ.
J. D. TAYLOR, *Not. Pub.*

A true copy of the original.
New Orleans, June 15th, 1885.
[SEAL.] (Signed) J. D. TAYLOR, *Not. Public.*

Document. Regular Monthly Meeting of the Board of Directors of the N. O. Water Works Co. Offered in Evidence by Plaintiffs and Filed January 9th, 1889.

Copy.

Regular monthly meeting, October 1st, 1884.

Present: Messrs. A. Baldwin, J. D. Houston, H'y Abraham, and Hon. I. W. Patton.

The minutes of the previous meeting were read and adopted, and full statement of the affairs of the company was submitted by the sec'ty.

The communication from Mr. Golding, which was presented at the last meeting and postponed, relative to attaching his
223 new engine to the old engine of the company, was brought up. Mr. Houston moved that he be granted permission to make the test of his engine as requested, with the proviso that it be done without expense to the company, and be removed, when requested to do so, at his own expense; seconded by Mr. Abraham and carried.

Mr. Abraham made the following motion:

That whereas, at the last meeting of the board, Mr. J. D. Houston resigned his position as superintendent of this company;

And that whereas, owing to the valuable services rendered by him during his occupancy of the position of superintendent and as an evidence of the appreciation of this board:

Resolved, That the sum of six thousand dollars be, and is hereby, donated to him; seconded by Hon. I. W. Patton and carried unanimously.

Mr. Houston made the motion that the bond of the secretary and treasurer be fixed at ten thousand dollars; seconded by Mr. Abraham and carried.

Communication was read from Mess. P. E. Theard & Sons for Sister Gregoria, superioress Asylum of the Little Sisters of the Poor, in the sixth district of the city, asking that the necessary supply of water for the use of the asylum be granted free of charge.

Mr. Houston moved that the request be granted and carried.

Communication from Judge J. R. Beckwith was read relative to cutting off the water supply from rice mills and other steam-users in default to this company.

Mr. Houston made the motion that "the supply of water be shut off, agreeably to the opinion of Judge Beckwith, from all rice
224 mills and other steam-users in default to this company, such cut-off to take place when steam is off, and they be notified promptly thereafter; seconded by Mr. Abraham and carried.

There being no further business, on motion the board adjourned.

(Signed) R. L. McMURDO, *Sec'y.*

I certify that the above is a true copy from the minute book of the company.

(Signed) R. L. McMURDO, *Sec'y.* [SEAL.]

Document. Certified Copy of Opinion and Decree of the Supreme Court of Louisiana. Offered in Evidence by Plaintiffs and Filed January 7th, 1889.

Supreme Court of the State of Louisiana.

CLERK'S OFFICE, NEW ORLEANS, *May 23rd,* 1887.

E. CONERY, JR., *et al.*
vs.
NEW ORLEANS WATER WORKS COMPANY *et als.* } No. 9693.

Appeal from the civil district court for the parish of Orleans.

Mr. Justice Todd delivered the opinion and decree of the court in the words and figures following, to wit:

This is an action of the part of plaintiffs, residents of the city of New Orleans, alleging themselves to be tax-payers to the city
225 in a sum exceeding $10,000, against the city of New Orleans and the New Orleans Water Works Company and others,

seeking to restrain the execution of a contract entered into between the city and the said water-works company on the 3rd of October, 1884, and to prevent the council of the city from making any appropriation out of the public treasury in furtherance of the contract and the ordinance authorizing it, and further asking that said contract and ordinance be declared null and void.

The petition charges as the ground of nullity that said contract and ordinance violate expressly the terms of the charter of the company and are *ultra vires* and unconstitutional, null, and void, and sets forth at great length the causes or reasons of the illegality and nullity propounded.

To this petition the city of New Orleans filed the following exceptions:

1st. That plaintiff had no capacity to stand in judgment.

2. That the petition disclosed no cause of action. The water-works company presented exceptions which, though differently formulated, were in substance the same as the above. The judge *a quo*, for reasons assigned, in a lengthy and elaborate opinion sustained the exception as to the right or capacity of the plaintiff to maintain the action or stand in judgment and dismissed the suit. From this judgment the plaintiffs appealed. This precise question
226 was involved in the case of Handy *et al. vs.* City of New Orleans, recently decided and not yet reported. Like the instant one, that was a case where a number of tax-payers and residents of the city joined in a suit for the annulment of a contract and ordinance of the city touching the wharf lease on grounds very similar in every respect to those urged in the case before us.

We quote from the syllabus of that case to show the identity of the questions involved in the two cases and how they were decided:

"Tax-payers have a standing in court to contest, upon proper charges, the validity of a municipal ordinance and contract executed under it whenever its enforcement may increase the burden of taxation."

"A district court, the low limit of whose jurisdiction is fixed, has jurisdiction to pass on such a controversy when the matter in dispute, which is the value of the contract, exceeds that limit, and the supreme court has jurisdiction on appeal when this value exceeds two thousand dollars."

It plainly appears, therefore, from this recent ruling of this court, amply supported by the authorities cited in the opinion, that in the instant case the decision of the lower court upon the exception in question was erroneous. Notwithstanding that this question
227 of the right or capacity of the parties to stand in judgment was the sole question decided by the court *a quo*, as abundantly shown by the reasons therein assigned for the judgment rendered, yet the counsel on both sides have — in a lengthy and very able discussion of the exception as to "no cause of action," filed but not determined in the court below. We have examined thoroughly the record of the case and are satisfied that there exists little or no dispute as to the facts out of which this controversy has grown, and that therefore the determination of the exception of "no cause of

action" will determine fully the merits of the cause. This vital issue has not been passed upon or even considered by the judge *a quo*, as we learn from his written opinion in the record. It is the province of an appellate court to review the proceedings of the inferior court and to determine whether its ruling and decrees therein embraced are right or wrong, and not to deal with matters and issues distinctly presented by the pleadings but not considered or decided by that court. 19 L., 207; 9 R., 256; 7 A., 622; 10 A., 552; 11 A., 746; 15 A., 159.

We conclude, therefore, that it is proper to remand the cause that the all important issue raised by the exception referred to, not passed on by the court of the first instance, may be there tried and determined.

It is therefore ordered, adjudged, and decreed that the judg-
228 ment of the lower court sustaining the exception touching the right or capacity of the plaintiffs to maintain the suit and stand in judgment and questioning the jurisdiction of the court be, and the same is hereby, reversed and the cause remanded to be proceeded with according to law, the costs of the lower court thus far incurred on the exception overruled and of this appeal to be paid by appellees and the further costs to abide the final issue of the case.

Agreement. Filed May 24th, 1887.

Supreme Court, State of Louisiana.

EDWARD CONERY *et al.*
vs.
THE NEW ORLEANS WATER WORKS COMPANY & CITY OF NEW ORLEANS. } No. 9693.

And now come the said defendants, The New Orleans Water Works Company and The City of New Orleans, defendants and appellees in this cause, and expressly waive all delays allowed by law before this decree in this cause can become final and any and all right to petition for rehearing herein in order that the trial of this cause may be expedited in trial in the court below, and move the court that the same may be considered executory and the clerk of this court ordered to make and deliver the copy of the decree herein and all other papers necessary to be remitted to the civil
district court, as in case of a final executory decree as to
229 the matters determined on the appeal herein remanding the cause to said court for trial.

(Signed) J. R. BECKWITH,
Counsel for N. O. W. W. Co.

(Signed) W. H. ROGERS,
City Att'y.

Extract from the Minutes of Tuesday, May 24th, 1887.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, Charles E. Fenner, Lynn B. Watkins, associate justices.

E. CONERY, Jr., *et al.*
vs.
N. O. WATER WORKS CO. *et al.* } No. 9693.

On motion of J. R. Beckwith, for defendant, and W. H. Rogers, city att'y, and considering the consent in writing of counsel herein to the effect that the judgment herein be considered as final and executory, and that a copy of the same is necessary for further proceedings in the district court thereunder, it is ordered that a copy of the opinion and decree herein, together with copy of said consent and of this order, be made and duly certified by the clerk as final and executory.

(A true copy.)

[SEAL.] (Signed) JOHN AUGUSTIN, *D'y Clerk.*

230 *Documentary Evidence of Defendant. Document Marked "A." Act of Sale of Property Rights, etc., by the Commercial Bank of N. O. to the City of N. O. Offered by Def't and Filed January 6th,* 1889.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Be it known that on this nineteenth day of January, in the year of our Lord one thousand eight hundred and sixty-nine, and the ninety-third of the Independence of the United States of America, before me, Andrew Hero, Jr., a notary public in and for the parish of Orleans and official notary for the city of New Orleans, duly commissioned and qualified, and in presence of the witnesses hereinafter named and undersigned, personally came and appeared the Honorable John R. Conway, mayor of the city of New Orleans, and herein acting in such capacity of mayor under and by virtue of resolution number 1232, new series, passed by the honorable the common council of New Orleans, approved January the sixteenth, 1869, a certified copy of which is hereto annexed for reference, and the same is in the words and figures following, to wit:

Resolved, That in order to complete the purchase and delivery of the water works purchased from the Commercial Bank of New Orleans the mayor be, and is hereby, authorized to sign a nota-
231 rial act acknowledging delivery of the same and the movable and immovable property included in said purchase, and on the signing of such act by the president of the Commercial Bank within sixty days from the signing of such act bonds of the city of

New Orleans to the amount of thirteen hundred and ninety-three thousand and four hundred dollars, having thirty years to run and bearing interest at the rate of five per centum per annum from the 1st of January, 1869, payable semi-annually, on the first day of January and the first day of July in each and every year, provided the same meet with the approval of the city attorney; and also came and appeared Felix Labatut, president of the Commercial Bank of New Orleans, a duly incorporated institution of this State, and herein acting in such capacity of president under and by virtue of a resolution passed at a meeting of the board of directors of said bank held on the thirteenth day of January, instant, a duly certified copy of which said resolution is hereto annexed for reference—

Which said parties declared that whereas by an act of the Legislature of this State incorporating the said Commercial Bank and granting it the privilege of conveying water from the Mississippi river into the city of New Orleans and its faubourgs and into the houses of its inhabitants, entitled "An act to incorporate the Commercial Bank of New Orleans," approved April 1st, 1833, it was provided by the fourth and forty-second sections thereof that at any time after the expiration of thirty-five years from the passage of said act it shall be lawful for the corporation of the city
232 of New Orleans to purchase from said Commercial Bank of New Orleans the water works to be constructed by said company by virtue of said act at a price to be fixed by arbitrators, of whom five shall be chosen by the president and the directors of said Commercial Bank of New Orleans and five by the city council of New Orleans, and none of whom are to be stockholders in said company nor members of the city council of New Orleans, and that the award of said arbitrators in writing, in case of their agreement, should be binding on the respective parties, and that the amount so decided upon should be payable in bonds of the mayor, aldermen, and inhabitants of New Orleans, bearing an interest of five per centum per annum, payable semi-annually and redeemable in not less than ten nor more than thirty years from the day on which said award should be signed and the said water works delivered over to the said corporation of New Orleans;

And whereas the city of New Orleans has deemed it expedient to purchase the said water works, as provided for in sections 4 and 42 of the aforesaid act, and has signified its intention so to do under and by virtue of resolution No. 889, new series, passed by the honorable the common council of New Orleans and approved March 27th, 1868; a certified copy of which said resolution is hereto annexed and it is in the words and figures following, to wit:

No. 889, new series.

233 Whereas by an act of the Legislature of the State of Louisiana to incorporate the Commercial Bank of New Orleans, approved April 1st, 1833, establishing a company in the city of New Orleans invested with banking privileges and to be entitled the

"Commercial Bank of New Orleans," the chief object of which said company is to be the conveying of water from the river into the city of New Orleans and its faubourgs and into the houses of its inhabitants;

Whereas the first section provides the original capital stock shall be three millions of dollars; whereas the fourth section provides that at any time after the expiration of the thirty-five years from the passage of this act it shall be lawful for the corporation of the city of New Orleans to purchase from the Commercial Bank of New Orleans the water works constructed by said company in virtue of this act and said company shall not refuse to sell the works aforesaid, with all the rights and privileges appertaining to the same, on the terms hereinafter provided;

Whereas the thirty-eighth section provides that the corporation of New Orleans shall be supplied by said company free of charge with all water necessary for the extinguishment of fires and other public purposes; as they progress in laying aqueducts they shall place free of any charge whatever two hydrants of proper construction in front of each square, and the said company shall supply a sufficient quantity of clear, pure, and wholesome water for the use of the inhabitants at the elevation of fifteen feet when the same may
234 be required;

Whereas the forty-second section provides that if after the expiration of thirty-five years the said corporation of New Orleans shall be inclined to buy the said water works from the Commercial Bank of New Orleans the price shall be fixed by arbitrators, five of whom shall be chosen by the president of the Commercial Bank of New Orleans and five by the city council of New Orleans; said arbitrators shall take into consideration the value of the water works and grounds appertaining thereto, and the amount so agreed upon shall be payable in bonds bearing five per cent. interest, redeemable in not less than ten nor more than thirty years: Be it

Resolved, That the city of New Orleans will purchase the water works upon the terms and conditions as provided for in act of the Legislature of the State of Louisiana to incorporate the Commercial Bank of New Orleans, approved April 1st, 1833.

(Signed) WM. T. HEPP,
President Board of Assistant Aldermen.

(Signed) JAMES GRAHAM,
President Board of Aldermen.

Approved March 27th, 1868.

(Signed) E. HEATH, *Mayor.*

A true copy.

D. R. WHITAKER, *Secretary.*

235 And whereas, agreeably to the provisions of said section 42 of the aforesaid act of the Legislature incorporating said Com-

mercial Bank of New Orleans, the common council of the city of New Orleans, at a joint session thereof held on the 7th April, 1868, elected Messrs. Josiah B. Richardson, Edward Filleul, John M. G. Parker, William H. Bell, and Daniel Blair, all of this city, as the five arbitrators on the part of the city, and at a subsequent joint session of said council held on the 5th day of May, 1868, John Lockwood, of this city, was elected as one of the five arbitrators on the part of the city in the place of Daniel Blair, previously elected, but who had resigned the position of such arbitrator, as will appear by reference to the annexed extract from the minutes of said common council; and the president and directors of said Commercial Bank, agreeably to said section No. 42, at a meeting thereof held on the 2nd May, 1868, elected Messrs. William C. C. Claiborne, John Community, Frank H. Hatch, James Freret, and Joseph Hernandez, all of this city, as the five arbitrators on the part of the said Commercial Bank of New Orleans, as will appear by reference to the annexed extract from the minutes of the proceedings of the said meeting;

And whereas the said ten arbitrators, after having taken into consideration the value of the said water works and ground appertaining thereto for supplying the city and faubourgs of New Orleans with water by the said company, agreed and fixed the price at which said water works and all its appurtenances (with the exception
236 of the buildings and lot of ground situated on Dryades street) should be sold to the city of New Orleans for the sum of two millions of dollars, payable in bonds of the city of New Orleans, as provided for by the 42 section of the charter of said bank; which said report is in the words and figures following, to wit:

To the honorable mayor and common council of New Orleans:

We, the undersigned, having been appointed by the city of New Orleans and the Commercial Water Works Company arbitrators for the purpose of fixing the price for which said water works and its appurtenances are to be sold to said city of New Orleans, five of us having been appointed by the common council of said city—

J. M. G. Parker, Josiah B. Wilkinson, John Lockwood, Edward Filleul, and William H. Hall—

And five by the said Commercial Water Works Company, namely, W. C. C. Claiborne, John Community, Frank H. Hatch, James Freret, and Joseph Hernandez, after having met several times and examined thoroughly the property of said company and taken into consideration the value of the water works and grounds appertaining thereto for supplying the city and faubourgs of New Orleans with water by said company, hereby fix the price of said water works, in pursuance to the 42 section of the charter of said corporation, at the sum of two millions of dollars, for which price the water works and all its appurtenances (with the exception of the buildings and lot of ground situated on Dryades street) are to be sold by the said corporation to the city of New Orleans, the said sum

237 payable in bonds of the city of New Orleans, as provided by the 42 section of the charter of said bank.

JOHN LOCKWOOD.
W. C. C. CLAIBORNE.
JOSIAH B. WILKINSON.
F. H. HATCH.
J. HERNANDEZ.
E. FILLEUL.
H. H. BELL.
JOHN M. G. PARKER.
JOHN COMMUNY.
JAMES FRERET.

New Orleans, July 22nd, 1868.

All relative to which will more fully appear by reference to the annexed certified extract from the proceedings of the board of assistant aldermen of the common council of the city of New Orleans at a meeting thereof held on the 28th day of July, 1868;

And whereas the city of New Orleans is a stockholder in the capital stock of the said Commercial Bank of New Orleans for five thousand shares of one hundred dollars each, by reason of which the said city is entitled to a credit of five hundred thousand dollars on the aforesaid sum of two millions of dollars agreed upon by the said arbitrators as the price which the said city of New Orleans should pay for the said water works and appurtenances; said city is also entitled to a further credit on said price of the sum of one hundred and six thousand six hundred dollars, the same arising from its interest as such stockholder in and to the cash pertaining to the sinking fund created under provisions of the 23rd section of the charter of said Commercial Bank; and which said sum of five hundred thousand dollars and one hundred and six
238 thousand six hundred dollars, making the total sum of six hundred and six thousand six hundred dollars, being deducted from the said price and sum of two millions of dollars, makes the amount which said city of New Orleans is to pay for the aforesaid water works, with the appurtenances and grounds appertaining thereto, the sum of one million three hundred and ninety-three thousand and four hundred dollars, payable in bonds, which the said city is authorized to execute and deliver under the provisions of an act of the General Assembly of this State entitled "An act to amend an act entitled 'An act to incorporate the Commercial Bank of New Orleans, approved April 1, 1883,' approved July 22nd, 1868:"

Now, therefore, in consideration of the premises and in order to give unto the city of New Orleans an authentic title to the said water and all appurtenances thereto pertaining, the said Felix Labatut moreover declared in his said capacity that by virtue of the authority in him vested by the aforesaid resolution of the board of directors of said Commercial Bank of New Orleans, and for the consideration and on the terms and conditions hereinafter expressed, he does by these presents cede, grant, bargain, sell, transfer, assign, set

over, and deliver unto the city of New Orleans, herein represented by the said Honorable John R. Conway, mayor thereof, who accepts the same for the said city and its assigns and acknowledges delivery and possession thereof—

239 All and singular the property, real and personal, of whatever nature or kind soever belonging to the water works constructed and established by the said Commercial Bank of New Orleans, and the dykes, mounds, reservoirs, machinery, engines, boilers, pumps, conduits, aqueducts, pipes, tools, and other appurtenances appertaining thereto.

And the real estate aforesaid is described as follows, to wit:

1st. A certain square of ground, together with the reservoir, buildings, and all other improvements thereon, and the rights, servitudes, ways, privileges, and appurtenances thereto belonging or in anywise appertaining, situated in the Faubourg Annunciation, first district of this city, designated by the number 18 on a plan of said faubourg drawn by B. Lafin, surveyor, dated the fifteenth day of May, one thousand eight hundred and seven, which said square is bounded by Religious, St. Thomas (formerly St. John the Baptist), Richard, and Market streets, and it has a front on each of the said streets of three hundred feet. Said square of ground was acquired by the said Commercial Bank of New Orleans by purchase and as the last and highest bidder thereon at a public sale thereof made by George Washington Morgan, sheriff of the parish of Orleans aforesaid, on the fifth day of May, 1884, under and by virtue of an order of seizure and sale to him directed by the honorable the parish court of the parish of Orleans, at the suit of Didier Dreux *versus*

John Green, No. 7277 of the docket of the said court, as per

240 the deed of said sale in the premises hereunto annexed, made by said sheriff and bearing date the nineteenth day of May, eighteen hundred and thirty-four; and by an act passed before Hilary B. Cenas, late a notary in this city, on the nineteenth day of May, eighteen hundred and thirty-four, John D. Pein, James Puech, John Armstrong, William E. Leverich, Alexander McKeever, Isaac J. McCabe, and Sarah Matilda Beck, parties to said act, joint proprietors of said square of ground claimed by him or her therein, ratified and confirmed the said sheriff's sale and held the same binding on them in the same manner and to the same extent as if it had been their own proper act and will, all in relation to which will more fully appear in the said act, to which reference is hereby made.

2nd. A certain piece or portion of ground, together with all the buildings and improvements thereon, and the machinery, besides engines, cisterns, rights, privileges, servitudes, ways, and appurtenances thereunto belonging or in anywise appertaining, situated in the Suburb Lacourse, first district of this city, in the square bounded by New Levee, Tchoupitoulas, Richard, and Orange streets, and measuring one hundred and ninety-one feet nine inches and six lines front on New Levee street, one hundred and ninety-one feet nine inches and four lines front on Tchoupitoulas street, three

hundred and eighty-three feet seven inches and three lines
241 front on Richard street, and three hundred and eighty-three feet seven inches and three lines on a straight line running from the termination of the line on New Levee street aforesaid to the termination of the line on Tchoupitoulas street aforesaid, parallel to Orange street, and dividing the said piece or portion of ground from the properties now or formerly belonging to A. Caldwell and to R. Toledano, which forms the remainder of said square.

Said piece or portion of ground was, prior to its acquisition by the said Commercial Bank of New Orleans, divided into twenty lots, and they were acquired by said Commercial Bank as follows, to wit, eight thereof designated by the numbers 1, 2, 3, 4, 5, 18, 19, and 20 on a plan thereof drawn by Charles F. Zimple, surveyor, and deposited in the office of G. R. Stringer, late a notary in this *office*, as plan No. 4, and measuring together one hundred and ninety-one feet, nine inches and four lines front on Tchoupitoulas street and one hundred and eighty-four feet four inches and seven lines front on Richard street, forming the corner of Tchoupitoulas and Richard streets in said square, by purchase and as the last and highest bidder thereon at a public sale thereof made by George W. Morgan, sheriff of this parish, on the sixteenth day of June, A. D. eighteen hundred and thirty-four, by virtue of an order of execution to him directed by the district court of the first judicial district
242 of the State of Louisiana, in a suit of partition entitled John Green — John Justamond *vs.* Widow Maguire, in her own name and as tutrix of her minor child, No. 11213 of the docket of said court, as per the said sheriff's deed of said sale, dated the 10th day of July, 1834; also seven thereof designated by the numbers 1, 2, 3, 4, 5, 6, and 7 on a plan drawn by said Surveyor Zimple, dated April 27th, 1832, and deposited in the office of said late notary, H. B. Cenas, which said seven lots measure together seventy-one feet nine inches and six lines front on New Levee street and one hundred and ninety-nine feet two inches and four lines front on Richard street, forming the corner of New Levee and Richard streets, in said square, by purchase from Levi Pierce, as per the act of sale thereof passed before the said late notary, H. B. Cenas, on the 13th day of April, 1835; also two thereof designated by the numbers "9" and "10" on a plan drawn by said Surveyor Zimple, deposited in the office of said notary, E. R. Stringer, and measuring together forty-eight feet front on New Levee street, by purchase from Pascal and Tourne and Nicholas Beckwith, as per the act of sale thereof passed before the said late notary, H. B. Cenas, on the third day of April, 1835; lastly, the three remaining of said lots, designated by the numbers "6," "7," and "8" on a plan drawn by Surveyor Zimple in the year 1882 and deposited in the office of said notary, G. R.
243 Stringer, measuring together seventy-two feet front on New Levee street, by purchase from Alexander Graithe, as per the act of sale thereof passed before the said late notary, H. B. Cenas, on the 14th day of February, 1839, and by an act of compromise entered into between the said Alexander Grailhe and the said Commercial Bank of New Orleans and passed before the said notary,

H. B. Cenas, on the 13th day of December, 1884, certain matters in dispute between the said parties growing out of said sale were settled to their mutual satisfaction.

And the personal property herein transferred having been delivered to the commissioners of the water works of said city of New Orleans, and they being satisfied with the quantity and nature of the articles so delivered, the said Mayor Conway hereby dispenses with a particular and exact inventory thereof for annexation hereto, as is otherwise required by law.

By reference to the annexed certificates of the register of conveyances and the recorder of mortgages in and for this city and parish, dated this day, it will be seen, first, that the real estate and appurtenances herein described have not been alienated by said Commercial Bank of New Orleans prior to the date hereof and stand registered in its name, and, second, that the said property is free
244 from encumbrances in the name of said bank, with the exception of the privilege of drainage, and also the general mortgage in favor of the city of New Orleans for the sum of two thousand three hundred and ninety-two dollars, with interest, costs, &c., resulting from a judgment rendered by the hon. the second district court of New Orleans on the thirteenth day of March, 1858, against the Commercial Bank water works for taxes of eighteen hundred and fifty-six:

To have and to hold the same property and appurtenances unto the city of New Orleans and its assigns forever.

And the said Labatut in his said capacity moreover transfers unto the city of New Orleans all the rights and actions of warranty to which the said Commercial Bank of New Orleans is or may be entitled against all the former proprietors of the property herein conveyed, subrogating the said city of New Orleans to the said rights and actions to be by it enjoyed and exercised in the same manner as they might have been by said Commercial Bank of New Orleans. This sale and transfer is made and accepted in conformity with the above award of said arbitrators and agreeably to the aforesaid deduction agreed upon by and between the board of directors of said Commercial Bank of New Orleans and the city of New Or-
245 leans for and in consideration of the price and sum of one million three hundred and ninety-three thousand four hundred dollars and interest as hereinafter expressed, in settlement of which the said Mayor Conway hereby promises for and binds and obligates the city of New Orleans to deliver or cause to be delivered, within sixty days from and after the date of these presents, unto the president of said Commercial Bank of New Orleans, bonds of the city of New Orleans, signed by the mayor, comptroller, and treasurer thereof, amounting in the aggregate of the said sum of one million three hundred and ninety-three thousand four hundred dollars, and of such amounts as may be agreed upon, payable on the 1st day of January, A. D. eighteen hundred and ninety-nine, at the office of the city treasurer, from and after the first day of January, A. D. 1869, payable semi-annually on the first day of January and July of each and every year during the period aforesaid, at the

office of said city treasurer, and for which interest the requisite number of coupons will be attached to each bond.

The aforesaid described real estate is exempted by law from the payment of all State and city taxes, and receipts have been produced and exhibited to me, notary, showing that eight several instalments for drainage have been paid on said property.

246 And finally it is understood and agreed to that the buildings and lots of ground situated on Dryades street and specified in the aforesaid report of the said arbitrators as being excluded from this sale and transfer *is* more particularly defined and described as a certain lot of ground, together with all the buildings and improvements thereon and all rights and privileges thereto belonging, situate in the first district of this city in the square bounded by Dryades, Canal, Rampart, and Common streets, and measuring in English measure fifty-two feet front on Dryades street and forty-five feet in width in the rear by one hundred and five feet six inches in depth, being the same property which the said Commercial Bank of New Orleans acquired by purchase from Mrs. Morton Jackson by an act passed before said late notary, Hilary B. Cenas, on the second day of March, one thousand eight hundred and fifty-seven.

Thus done and passed, in my office, at New Orleans aforesaid, in the presence of Mr. James Graham and George Cenas, witnesses of lawful age, domiciliated in this city, who hereunto sign their names with the parties and me, the said notary, on the day and year set forth in the caption hereof after due reading of the foregoing.

(Original signed) FELIX LABATUT, *President.*
" JOHN R. CONWAY, *Mayor.*
" JAMES GRAHAM.
" GEO. CENAS.
" ANDREW HERO, JR., *Not. Pub.*

Approved:

HENRY J. LEOVY, *City Att'y.*

247 Registered in conveyance office, B. 96, fo. 65, 66, and 67. New Orleans, March 22nd, 1869.

P. G. LABARRE, *D'y R. C.*

A true copy of the original on file in my office.
New Orleans, Dec'r 21st, A. D. 1888.

(Signed) ANDREW HERO, JR., [SEAL.]
Not. Public.

Document Marked "B" (Copy of Bill of Complaint). Filed January 16th, 1889. Offered in Evidence by the Defendant.

U. S. Circuit Court, Eastern District of Louisiana.

CITY OF NEW ORLEANS
vs. } No. 8643.
JOHN A. MORRIS *et als.*

To the honorable the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

The city of New Orleans, a municipal corporation chartered by and organized under the laws of the State of Louisiana, and as such a citizen of said State, herein appearing by the Hon. Isaac W. Patton, her mayor, brings this her bill against John A. Morris, a citizen of the State of New York, residing in the State of Louisiana; Freeman Clark, a citizen and resident of the State of New
248 York; John Klein, a citizen and resident of the State of Mississippi; Charles T. Howard and Jack Wharton, both citizens and residents of the State of Louisiana.

And thereupon your orator complains and says that the said John A. Morris, Freeman Clark, John Klein, and Charles T. Howard, as the subrogees of Myra Clark Gaines, having respectively obtained judgments in this honorable court against your oratrix in the suits entitled "John A. Morris *vs.* The City of New Orleans, No. 7362; Freeman Clark *vs.* Jefferson City Gas-Light Co. *et als.*, No. 7142; Freeman Clark *vs.* Jefferson Gas-Light Co. and City of New Orleans, No. 8349; John Klein *vs.* City of New Orleans, No. 7801, and Myra Clark Gaines, Chas. T. Howard, subrogated, *vs.* City of New Orleans, No. 2695 of the docket of this honorable court, have caused writs of *alias pluries fieri facias* and writs of *fieri facias* to issue thereunder, have placed the said writs in the hands of Jack Wharton, the marshal of this honorable court, and have caused him to seize thereunder and to advertise for sale, on Saturday, the 18th day of January, 1879, the following-described property, to wit: "All the rights, title, and interest of the city of New Orleans in the New Orleans Water Works Company, consisting of four thousand three hundred and forty-four (4,344) shares of the capital stock, more or less;" all of which will more fully appear by reference to the notices of seizure, directed to and served upon your oratrix, fully describing said property, and by reference to the official advertisement of sale, which are hereto annexed and made part of this bill and marked Exhibits A 1, A 2, A 3, A 4, A 5, and A 6:

249 Now your oratrix complains and says that on the 1st day of April, 1833, the Legislature of the State of Louisiana passed an act to incorporate the Commercial Bank of New Orleans, and conferred on said bank so incorporated the exclusive privilege of supplying the inhabitants of the city of New Orleans with water from the Mississippi by means of pipes and machinery; that said act provided that at any time after the expiration of thirty-five years from

the passage of said act it should be lawful for the corporation of the city of New Orleans to purchase from said Commercial Bank the water works constructed by said company in virtue of said act, and that said bank should not refuse to sell said works as aforesaid; that by said act it was further provided that the price to be paid by the city of New Orleans for said water works should be paid in bonds of the city of New Orleans, bearing five per cent interest, payable semi-annually, and that on such payment being made the water works were to be delivered to the city; that on the twenty-seventh of March, 1868, a few days before the expiration of the thirty-five years fixed in the act of April 1st, 1833, The City Council of New Orleans, your oratrix, resolved to purchase said water works on the terms prescribed by said act of 1833: that the arbitrators appointed under said act of 1833 appraised said works at $2,000,000.00, payable in city bonds, but that as your oratrix owned 5,000 shares of the stock of said company, valued at $500,000, and was also entitled as a stockholder to an interest in a sinking fund owing by
250 said bank, which said interest of your oratrix was valued at $106,600, your oratrix was compelled to deliver to said Commercial Bank, in payment of the price of said water works, bonds to the amount of only $1,393,400; that accordingly, on the 19th day of January, 1869, said Commercial Bank, by notarial act, sold and delivered said water works to your oratrix, who thereafter continued to control and manage the same as sole owner down to the year 1878.

That in the charter of your oratrix, passed in the year 1870 by the Legislature of the State of Louisiana, under which your oratrix now exists and performs her governmental functions, a special department was created known as the department of water works and public buildings, and a special officer was created known as the administrator of water works and public buildings, whose duty it was to contract and administer said water works as a necessary and vital instrumentality of a great municipal corporation.

That in the year 1877 the Legislature of the State of Louisiana, finding your oratrix in a bankrupt condition, her citizens impoverished, her taxable property enormously decreased in value, harassed by her creditors, and unable to pay the interest on her debt, and notably the interest on the bonds issued by your oratrix in payment of the purchase price of said water works, and un-
251 able to extend said water works as the exigencies of the city required, did on the 31st day of March of said year pass an act known as act No. 33 of the extra session of 1877, and entitled "An act to enable the city of New Orleans to promote the public health and to afford greater security against fire by the establishment of a corporation to be entitled the New Orleans Water Works Company," to authorize said company to issue bonds for the purpose of extending and improving the said works and to furnish the inhabitants of New Orleans an adequate supply of pure and wholesome water, to permit the holders of water-works bonds to convert them into stock, and to provide for the liquidation of the bonded and floating debt of the city of New Orleans," as will more fully appear

by reference to said act, a printed copy of which is hereunto annexed and made part of the bill and marked Exhibit B.

That under the provisions of section 4 of said act your oratrix has transferred to said company by notarial act the said water works purchased by your oratrix from the Commercial Bank on the 19th day of January, 1869.

That under the provisions of section 7 of said act No. 33 of the extra session of 1877 the stock owned by your oratrix in said water-works company under the provisions of said act was expressly declared not liable to seizure for the debt of your oratrix.

252 Now, your oratrix avers and says that the said Morris, Clark, Klein, Howard, and Wharton have no right to seize her interest in the said New Orleans Water Works Company, a corporation created by and under the authority of the State of Louisiana, in violation of the prohibition contained in the charter of said corporation; that even if there should have been no prohibition in said act against the seizure of and sale of the rights of your oratrix in said water-works company the said rights were, by their nature and character, not liable to such seizure, for the reason that the interest of your oratrix in said company is public property, used for public and necessary purposes and essential to the proper exercise of police powers of your oratrix.

That under the provisions of the charter of said water-works company your oratrix could not herself dispose of the stock owned by her in said company, except in the manner and for the purposes therein mentioned.

That by section 1st of said act No. 33 of the extra session of 1877 it is provided that the city of New Orleans, through its council, shall have authority to apply the stock subscribed for by the city, as therein provided, to the reduction of the bonded or floating debt of said city on such terms of adjustment as may be mutually agreed upon between the city council and the holders of such

253 bonded or floating debt.

And by virtue of said provisions your oratrix holds said stock in trust for the benefit of the holders of such bonded and floating debt, and that in compliance therewith she has been and still is applying the stock subscribed for and owned by her in said company to the reduction of said bonded and floating debt, and that said Morris, Clark, Klein, Howard, and Wharton have no right to arrest, hinder, prevent, or delay *nor* in the execution of said trust, nor to divert said trust property from the object to which it is specially dedicated by law and the charter of said New Orleans Water Works Company, or to divert said trust property solely and exclusively to their own use, as they are attempting to do, by the illegal seizures and sales, to the great wrong and injury of the other *cestui que trust*.

Your oratrix further complains and says that should said John A. Morris, Freeman Clark, John Klein, Charles T. Howard, and Jack Wharton, U. S. marshal of this hon. court, be permitted to persist in their said illegal seizures, advertisement, and sale of your oratrix's rights, title, and interest in the New Orleans Water Works

Company, consisting of 4,344 shares of the capital stock, more or less, such acts will cause great and irreparable injury to your oratrix, and also to the public interests, of which she is the
254 protector and guardian.

Wherefore your oratrix prays that the said John A. Morris, Freeman Clark, John Klein, Charles T. Howard, and Jack Wharton, their and each of their attorneys or agents, may be severally restrained — an injunction issuing out of this court from proceeding any further with the said seizures, advertisement, and sale of the property above described and under the judgment and executions above set forth, and that the said execution and the said seizures may be quashed, annulled, and set aside, and the said property declared to be exempt from and not subject to seizure, and that a restraining order may issue from this honorable court, directed to said John A. Morris, Freeman Clark, John Klein, Chas. T. Howard, and Jack Wharton, staying the said sale until the application herein made for an injunction can be heard, and that your oratrix may have generally such other and further relief as equity and the nature of the case may require.

Therefore will your honors grant unto your oratrix the writ of subpœna issuing out of and under the seal of this court, to be directed to the said defendants, John A. Morris, Freeman Clark, John Kelin, Charles T. Howard, and Jack Wharton, commanding them and each of them, by a certain day and under a certain penalty therein inserted, to appear before your honors in the circuit
255 court of the United States for the fifth circuit and district of Louisiana, and then and there answer the premises and abide the order of this court.

(Signed) E. HOWARD McCALEB,
City Att'y.

(Signed) E. H. FARRAR,
Sol'rs for Complainant.

Personally came and appeared before me, the undersigned authority, Isaac W. Patton, who, being duly sworn, deposes and says that he is the mayor of The City of New Orleans, the complainant in the above bill; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated to be on his information and belief, and that as to those matters he believes it to be true.

(Signed) I. W. PATTON,
Mayor City of New Orleans.

Sworn to and subscribed before me this 16th day of January, 1879.

(Signed) W. A. WOOLFLEY,
Comm'r U. S. Circuit Court.

DISTRICT OF LA., CLERK'S OFFICE.

I certify the foregoing bill to be a true copy of the original filed January 16th, 1879, and of record in this office.

Witness my hand and seal of said court, at the city of
256 New Orleans, this 19th day of December, 1888.
(Signed) E. R. HUNT, *Clerk.* [SEAL.]

Document Marked "D." Transfer and Sale — the City of New Orleans to the New Orleans Water Works Company. Offered in Evidence by Def't and Filed January 16th, 1889.

UNITED STATES OF AMERICA,
State of Louisiana, Parish of Orleans, City of New Orleans:

Be it known that on this 9th day of the month of April, in the year of our Lord 1878, and of the Independence of the United States of America the one hundred and second, before me, Gustave Le Gardeur, Jr., a notary public, duly commissioned and sworn, in and for the parish and city aforesaid, therein residing, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared the Honorable Edward Pilsbury, mayor of the city of New Orleans, herein duly authorized in the full execution of these presents under and by virtue of resolution No. 4416, administration series, adopted by the council of the city of New Orleans on the 26th day of March, 1878, a certified copy of
257 which said resolution is hereunto annexed for reference; and also came and appeared Edward Toby, Esq., of this city, herein appearing, stipulating, and acting for and in the name and on behalf and as president of the New Orleans Water Works Company, a corporation of this city, duly created by act No. 33 of the Legislature of this State, entitled "An act to enable the city of New Orleans to promote the public health and to afford greater security against fire by the establishment of a corporation to be called the 'New Orleans Water Works Company,' to authorize the said company to issue bonds for the purpose of extending and improving the said works and to furnish the inhabitants of New Orleans an adequate supply of pure and wholesome water, to permit the holders of water-works bonds to convert them into stock and to provide for the liquidation of the bonded and floating debt of the city of New Orleans," approved March 31st, 1877, and amended by act No. 43 of the Legislature of this State, entitled "An act relative to the charter of the New Orleans Water Works Company, and amending an act No. 33 of extra session of 1877," approved February 26th, 1878, the said Edward Toby herein acting as president aforesaid and duly authorized in the full execution of these presents under and by virtue of a resolution adopted by the board of directors of the said New Orleans Water Works Company, at their sitting of the 8th day of April, 1878, a certified copy of which said resolution is hereto annexed for reference—

258 Which said appearers, in their respective capacity, severally declared and said that in compliance with the provisions and requirements of said act No. 33, approved March 31st, 1877, as amended by said act No. 43, approved February 26th, 1878, the said New Orleans Water Works Company has been duly organized; that,

in accordance with the public notice given by the mayor, the subscribers to the capital stock of the said New Orleans Water Works Company have assembled together at the office of the Merchants' Mutual Insurance Company, No. 104 Canal street, in this city, on the thirteenth day of March, 1878, between the hours of 12 m. and 2 p. m., and that then and there, in compliance with the provisions of section 3 of said act No. 33, as amended by said act No. 43, they, the said subscribers, have elected the board of the said New Orleans Water Works Company, as the whole will more fully appear by the procés verbal of the meeting of the said subscribers, a certified copy whereof is hereto annexed for reference.

That in conformity with the provisions of said act No. 33, creating the said company, it, the said New Orleans Water Works Company, has transferred and delivered to the city of New Orleans, and is hereby acknowledged by the said Mayor Pilsbury for and in the name of the city of New Orleans, all the certificates for the shares of the stock of the said New Orleans Water Works Company, amounting to twenty thousand shares, of one hundred dollars each, forming the capital stock of two millions of dollars ($2,000,000) of
259 said company.

That, in further compliance with said act No. 33, approved March 31st, 1877, the stock thus transferred and delivered to the city of New Orleans as aforesaid has been disposed of by the said city in the manner following, to wit:

1st. Amount of stock, full paid and not subject to assessment, subscribed for by the city of New Orleans, six hundred and six thousand six hundred dollars	$606,600 00
2d. Amount issued to the city in the proportion of one share of stock, full paid and not subject to assessment, for each and every one hundred dollars of water-works bonds funded in premium bonds, four hundred and fifty-one thousand four hundred dollars	451,400
3d. Amount issued to the city in the proportion of one share of stock, full paid and not subject to assessment, for each and every one hundred dollars of water-works bonds redeemed by the city, one hundred and eleven thousand five hundred dollars	111,500 00
4th. Amount exchanged by the city with the subscribers to the capital stock of the said New Orleans Water Works Company, in the proportion of one share of stock, full paid and not subject to assessment, for each and every one hundred dollars of water-works bonds surrendered by the said subscribers to the city, five hundred and one
260 thousand six hundred	501,600 00
5th. Amount reserved for the benefit of all holders of water-works bonds who may elect to subscribe to the capital stock of the said New Orleans Water Works Company, to be exchanged by	

the city with the holders of said bonds in the proportion of one share of stock, full paid and not subject to assessment, for each and every one hundred dollars of said water-works bonds surrendered to the city, three hundred and twenty-eight thousand nine hundred dollars 328,900 00

Total amount of stock transferred and delivered to the city, two millions of dollars $2,000,000 00

Now, therefore, by virtue of the foregoing and in consideration of the two millions of dollars of stock hereinabove transferred and delivered to the city, the receipt whereof is hereby acknowledged by the said Mayor Pilsbury, he, the said Mayor Pilsbury, declared that by virtue of the authority in him vested by the aforesaid resolution, No. 4416, administration series, and in compliance with section 4 of said act No. 33, approved March 31st, 1877, creating the said New Orleans Water Works Company, he, the said mayor, does by these presents, in his said capacity and for and in the name and on the behalf of the city of New Orleans, grant, bargain, sell, convey, transfer, assign, and set over, with all legal warranties and with full subrogation to all the rights and actions of warranty to which the city of New Orleans is or may be entitled against all preceding
261 vendors and owners, unto the said New Orleans Water Works Company, the said Edward Toby, as president aforesaid, accepting and purchasing for and in the name of the said New Orleans Water Works Company and acknowledging due delivery and possession thereof—

All and singular the property, real or personal, of whatever nature or kind soever, belonging to the water works constructed and established by the Commercial Bank of New Orleans, and subsequently by the city of New Orleans, and the dykes, mounds, reservoirs, machinery and apparatus, engines, boilers, pumps, conduits, aqueducts, pipes, tools, and all appurtenances thereunto belonging or in anywise appertaining, and the following real estate, to wit:

1st. A certain square of ground, together with the reservoirs, buildings, and all other improvements thereon, and the rights, servitudes, ways, privileges, and appurtenances thereunto belonging or in anywise appertaining, situated in the Faubourg Annunciation, in the first district of this city, designated by the No. eighteen on a plan of said faubourg drawn by B. Lafon, surveyor, dated the fifteenth day of May, 1807; which said square is bounded by Religious, St. Thomas, formerly St. John the Baptist, Richard, and Market streets, and it has a front on each of the said streets of three hundred feet, and by a sketch made by J. A. D'Hemecourt, city sur-
262 veyor, dated the 5th day of April, 1878, and hereto annexed for reference, the said square is designated by the No. 83, and measures three hundred and nineteen feet eight inches and two lines front on Religious street, three hundred and nineteen feet ten inches and one line front on St. Thomas street, three hundred and nineteen feet eleven inches and one line front on Market stree

and three hundred and nineteen feet ten inches and four lines front on Richard street.

2nd. A certain piece or portion of ground, together with all the buildings and improvements thereon and the machinery and apparatus, boilers, engines, iron chimney, and all the rights, privileges, servitudes, ways, and appurtenances thereunto belonging or in anywise appertaining, situated in the suburb Lacourse, in the first district of this city, in the square bounded by New Levee, Tchoupitoulas, Richard, and Orange streets, and measuring one hundred and ninety-one feet nine inches and six lines front on New Levee street, one hundred and ninety-one feet nine inches and four lines front on Tchoupitoulas street, three hundred and eighty-three feet seven inches and three lines front on Richard street, and three hundred and eighty-three feet seven inches and three lines on a straight line running from the termination of the line on said New Levee street to the termination of the line on Tchoupitoulas street aforesaid, parallel to Orange street and dividing the said piece or portion of ground from the property now or formerly belonging
263 to A. Caldwell and R. Toledano, which forms the remainder of said square, which is designated by the No. thirty-nine on the above-mentioned annexed sketch by A. J. D'Hemecourt, according to which said sketch said piece of ground measures one hundred and ninety-one feet six inches and six lines front on New Levee street, one hundred and ninety-one feet seven inches and six lines front on Tchoupitoulas street, three hundred and eighty-three feet seven inches and two lines front on Richard St., and three hundred and eighty-three feet and eight inches on said line dividing the said piece or portion of ground from the property of Caldwell and Toledano.

All of which said above-described property, real and personal, was acquired by the city of New Orleans by purchase from the Commercial Bank of New Orleans by act passed before Andrew Hero, Jr., a notary public in this city, on the nineteenth day of January, 1869.

3d. A certain square of ground, together with all the rights, ways, privileges, and appurtenances thereunto belonging or in anywise appertaining, situated in the first district of this city, comprised between Peters (late New Levee), Water, Orange, and Richard streets and designated by the No. 32 A, as per plan drawn by Louis H. Pilie, surveyor, dated the 29th of June, 1867, and deposited for reference in the office of H. C. Dibble, a notary public in this
264 city, as plan No. 19, according to which said plan said square is divided into twenty-eight lots, numbered from one to twenty-eight, inclusive, and they measure as follows, to wit: Lot No. one forms the corner of Water and Richard streets and measures twenty-six feet nine inches and two lines front on Water street, twenty-six feet nine inches and three lines in width in the rear, by one hundred and nine feet and four inches in depth and front on Richard street. Lots Nos. two to eleven, inclusive, adjoin each other and measure each twenty-six feet and seven inches front on Water street by one hundred and nine feet and four inches in depth between parallel lines.

Lot No. twelve forms the corner of Water and Orange streets and measures twenty-six feet nine inches and two lines front on Water street, twenty-six feet nine inches and three lines in width in the rear, by one hundred and nine feet and four inches in depth and front on Orange street.

Lots Nos. thirteen and fourteen adjoin each other and measure each twenty-seven feet front on Orange street by one hundred and fifty-nine — eight inches and four lines, more or less, in depth between parallel lines.

Lot No. fifteen forms the corner of Orange and Peters streets and measures twenty-six feet eight inches and six lines front on Peters street, twenty-six feet nine inches and four and a half lines in width in the rear, by one hundred and nine feet and four inches in
265 depth and front on Orange street.

Lots Nos. sixteen to twenty-five, inclusive, adjoin each other and measure each twenty-six feet and seven inches front on Peters street by one hundred and nine feet and four inches in depth between parallel lines.

Lot No. twenty-six forms the corner of Peters and Richard streets and measures twenty-six feet nine inches and five lines front on Peters street by one hundred and nine feet and four inches in depth and front on Richard street.

Lots Nos. twenty-seven and twenty-eight measure each twenty-seven feet front on Richard street by one hundred and fifty-nine feet eight inches and four lines in depth between parallel lines.

And by the above-mentioned annexed sketch of J. A. D'Hemecourt said square is designated by the No. 21 B and measures three hundred and nineteen feet four inches and four lines in depth between parallel lines, and by the above-mentioned annexed sketch of J. A. D'Hemecourt said square is designated by the No. twenty-one B and measures three hundred and nineteen feet four inches and four lines front on Water street, three hundred and nineteen feet five inches and three lines front on Peters street, two hundred and seventy-two feet and eight inches front on Richard street and same front on Orange street.

And the said square of ground was acquired by the city of New Orleans from John H. O'Connor by act passed before Andrew Hero, Jr., a notary public in this city, on the sixteenth day of July, 1872:

266 To have and to hold the herein-conveyed property unto the said New Orleans Water Works Company, its successors and assigns forever, by virtue of these presents, subject to the provisions of section 17 of said act No. 33, approved March 31st, 1877, as amended by said act No. 43, approved February 26th, 1878.

By reference *of* the annexed certificate of the register of conveyances it does not appear that the herein-conveyed property has been heretofore alienated by the said vendor; and now the said parties hereto declare that they do hereby dispense with the certificate of the recorder of mortgages and exonerate the undersigned notary from any and all responsibility for the non-production of said certificate.

Thus done and passed in New Orleans, at my office, the day,

month, and year first above written, in the presence Messrs. Armand Pitot, Jr., and Edward Pitot, competent witnesses, who have signed with the said parties and me, notary, after reading the whole.

(Original signed) E. PILSBURY, *Mayor.*
EDWARD TOBY, *President.*
EDW. PITOT.
A. PITOT, JR.
G. LE GARDEUR, JR.,
Notary Public.

267 Registered in Conveyance Book No. 110, folio No 453, New Orleans, April 9, 1878.

[Seal of Register Conveyances.]

(Signed) D. B. PENN,
R. C., State of Louisiana, City of New Orleans.

I, Martin Voorhies, custodian of notarial records in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, do hereby certify the above and foregoing to be a true and correct copy of the original act extant and of record in the archives of Gustave Legardeur, Jr., late a notary public in this city, whose notarial records now belong to and are on file and of record in the archives of my office.

In faith whereof I hereunto set my hand and affix my seal of office this 23rd day of November, A. D. 1888.

[SEAL.] (Signed) M. VOORHIES,
Custodian Notarial Records.

Document Marked "E," Offered by Def't. Certificate of Number of Shares of Stock, etc., of N. O. W. W. Co. Standing in Name of Board of Liquidation. Filed January 16th, 1889.

OFFICE OF NEW ORLEANS WATER WORKS CO.,
NEW ORLEANS, *December 19th,* 1888.

I hereby certify that the total number of shares of stock standing in the name of board of liquidation of city debt is three thousand nine hundred and twenty-seven (3,927) at this date.

[SEAL.] (Signed) R. L. MCMURDO, *Secretary.*

268 *Document Marked "F," Offered by Def't. Certificate of Amounts Paid to City of N. O. for Taxes by the N. O. W. W. Co. Filed January 16th, 1889.*

OFFICE OF N. O. WATER WORKS CO.,
N. O., *Dec. 19th*, 1888.

I hereby certify that the following amounts have been paid by this company to the treasurer of the city of New Orleans for taxes:

1885.			
Oct. 19.	Paid city taxes for 1885		$20,619 37
1886.			
Oct. 14.	" 1886		22,093 59
1887.			
Sept. 3.	Paid city taxes for 1887		20,113 60
1888.			
Sept. 4.	" 1888		21,405 78
			$84,232 34

[SEAL.] (Signed) R. L. McMURDO, *Sec'y.*

Document Marked "G." Certificate of Amounts Paid by the N. O. W. W. Co. to the Board of Liquidation of City Debt as Dividends. Filed January 16th, 1889.

OFFICE OF NEW ORLEANS WATER WORKS CO.,
NEW ORLEANS, *Dec, 19th*, '88.

I hereby certify that the following amounts have been paid to the board of liquidation of city debt as dividends declared by this company:

1885.			
Ap'l 14.	P'd div'd No. 6, declared	Ap'l 8, '84	$2,781
"	" do. No. 7, "	Ap'l 8, '85	3,244 50
Nov. 5.	" do. No. 8, do.	Oct. 19, '85	1,854
1886.			
	Ap'l 16. P'd div'd No. 9, declared	Ap'l 9, '86	1,854
269	Do. P'd do. No. 10, do.	Oct. 6, '86	1,854 00
	Do. P'd do. No. 8, do.	Oct 19, '85	6,000
Ap'l 16.	P'd div'd No. 9, declared	Ap'l 9, '86	6,000 00
Do.	No. 10, declared	Oct. 6, '86	6,000 00
Do.	No. 11, do.	Ap'l 11, '87	7,854 00
Do.	No. 12, do.	Oct. 5, '87	7,854 00
Do.	No. 13, do.	Ap'l 10, '88	7,854 00
Do.	No. 14, do.	Oct. 3, '88	7,854 00
			$61,003 50

(Signed) R. L. McMURDO, *Sec'y.* [SEAL.]

Document Marked "X," Offered by Def't and Filed Jan'y 16th, 1889.

Ordinances of the city of New Orleans granting permission to lay pipes and furnish water to persons and corporations other than the New Orleans Water Works Company.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *November* 16, 1882.

(No. 8148, administration series.)

Be it ordained by common council of the city of New Orleans, That Robert E. Rivers or the lessee of the St. Charles Hotel, of the city of New Orleans, be allowed the right of way and privilege to lay
270 a water pipe from the Mississippi river, at any point opposite to the head of Common or Gravier street, through either of those streets to said hotel, its fronts and said streets, with all needed attachments and appurtenances, and to distribute said water through said hotel as said R. E. Rivers or lessee may desire from said pipes; the pipes to be put at a depth of three feet under the surface of the said streets, to be of iron, and of not more than — inches in diameter.

Be it ordained, That the said pipe and all attachments thereto in said streets be arranged and placed under the supervision and approval of the city surveyor, the pavements and streets to be relaid to the satisfaction of the administrator of improvements and city surveyor.

Adopted by the council of the city of New Orleans November 15, 1882.

Yeas—Fitzpatrick, Fagan, Mealey, and Walshe.

JOS. A. SHAKESPEARE, *Mayor.*

A true copy.
N. McNAMARA, *Secretary.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, *July* 18, 1882.

(No. 7952, administration series.)

Resolved, That permission be, and is hereby, granted George L. Bright to lay a water pipe under the shell road from new canal to Oakland park under the direction of the city surveyor and administrator of improvements.

Adopted by the council of the city of New Orleans July
271 18, 1882.

Yeas—Delamore, Fagan, Fitzpatrick, Huger, Walshe.
Absent—Guillotte, Mealey.

JOS. A. SHAKESPEARE, *Mayor.*

A true copy.
N. McNAMARA, *Secretary.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, 21*st Dec.*, 1882.

(No. 28, council series.)

Resolved, That permission be granted A. W. Moffatt the right to lay a one and a half (1½) inch pipe from his mill to the new canal for the purpose of supplying his boilers.

Adopted by the council of the city of New Orleans 19th December, 1882.

W. J. BEHAN, *Mayor.*

N. McNAMARE,
Clerk of Council.

A true copy.
C. L. WALKER,
Secretary to the Mayor.

MAYORALTY OF NEW ORLEANS,
CITY HALL, 18*th January*, 1883.

(No. 68, council series.)

Resolved, That permission be hereby granted to Mess. S. Hernsheim & Bro. to lay a pipe from *his* factory to the river, on Julia street, according to lines and grades to be given by the city surveyor, and the street to be repaired to the entire satisfaction of the
272 commissioner of public works.

Adopted by the council of the city of New Orleans 16th January, 1863.

N. McNAMARA,
Clerk of Council.

Approved 18th January, 1883.

W. J. BEHAN, *Mayor.*

A true copy.
C. L. WALKER,
Secretary to the Mayor.

MAYORALTY OF NEW ORLEANS,
CITY HALL, 1*st March*, 1883.

(No. 148, council series.)

Resolved, That permission be, and is hereby, granted Mess. S. Hernsheim & Bro. to lay pipes through the streets connecting their factory, corner Julia and Magazine streets, with the Mississippi river, provided that the streets through which said pipes are laid are placed in their original good conditon, the work to be done under the supervision of the commissioner of public works and city surveyor.

Adopted by the council of the city of New Orleans 27th February, 1883.

M. McNAMARA,
Clerk of Council.

Approved 1st March, 1883.

M. D. LAGAN,
Mayor pro Tempore.

A true copy.
C. L. WALKER,
Secretary to the Mayor.

273 MAYORALTY OF NEW ORLEANS,
CITY HALL, 15 *March*, 1883.

(No. 187, council series.)

An ordinance providing for the erection of all necessary machinery, boilers, and engines and laying of water and sewerage pipes in connection with the Louisiana Sugar Refinery Company's works.

Be it ordained, That permission be, and is hereby, granted to the Louisiana Sugar Refining Company to erect all necessary machinery, boilers, and engines in their factory, in course of construction, in the square bounded by Front, Clay, Bienville, and Custom-House streets, and to lay water and sewerage pipes from said factory to the Mississippi river according to lines and grades for same to be furnished by the city surveyor, provided that all excavations and streets, crossings, paving, etc., broken up shall be replaced, repaired, and relaid to the entire satisfaction of the commissioner of public works; revocable at the pleasure of the council.

Adopted by the council of the city of New Orleans 13th March, 1883.

N. McNAMARE,
Clerk of Council.

Approved 15th March, 1883.

W. J. BEHAN, *Mayor.*

A true copy.
C. L. WALKER,
Secretary to the Mayor.

MAYORALTY OF NEW ORLEANS,
CITY HALL, 25*th June*, 1883.

274 (No. 342, council series.)

An ordinance granting permission to the Enterprise Ice Manufacturing Company to erect all necessary machinery in their factory, corner of Peters and Pauline streets, and to lay water pipes in connection with the same *with* the Mississippi river.

Be it ordained by the council of the city of New Orleans, That permission be, and is hereby, granted to the "Enterprise Ice Manufacturing Company" to erect all necessary machinery on their premises, situated at the corner of Peters and Pauline streets, in the third district, and to lay pipes in connection with their factory across Peters street to the Mississippi river, to be used by the said factory as a water supply: Provided, That the said "Enterprise Ice

Manufacturing Company" binds itself to lay the above-mentioned pipes under the immediate supervision of the commissioner of public works, and, further, to repair and replace the streets and portion of the levee through which said pipes may lead in the same good order and condition as when first broken up; all of which shall be performed to the entire satisfaction of the said commissioner.

Adopted by the council of the city of New Orleans 21st June, 1883.

W. H. MICHEL,
Assistant Clerk of Council.

Approved 25th June, 1883.

W. J. BEHAN, *Mayor.*

275 A true copy.

C. L. WALKER,
Secretary to the Mayor.

MAYORALTY OF NEW ORLEANS,
CITY HALL, 1*st September*, 1883.

(No. 419, council series.)

Whereas a great source of complaint in the flowing of most offensive fluids in the gutters of Julia street, discharged from the oil factory of Maginnis & Brothers and Thompson's refinery, on Commerce between Julia and St. Joseph streets, the same being pronounced as not only offensive, but unhealthy, as well as acting as an obstruction to the proper drainage of the section through which the same flows: Therefore

Be it resolved, That Mess. Maginnis & Brothers and owners of Thompson's refinery be, and they are hereby, directed to lay suitable pipes to carry off all refuse matter to the river from their said factories, to wit, Maginnis & Bro. from their said factory, on Julia street, and the proprietors of Thompson's refinery from their said factory, on Commerce street, through Julia street, thence to the Mississippi river; said pipes to be laid within sixty days from the passage of this ordinance and the work to be done under the joint direction of the commissioner of public works and city surveyor.

SEC. 2. Resolved further, That in default of work being completed within sixty days from the passage hereof said parties be pro-
276 ceeded against according to law, and any violation of the provisions of this ordinance be punished by a fine of not less than $25 for each and every day they are in contravention and imprisonment for not less than thirty days.

Adopted by the council of the city of New Orleans 28th August, 1883.

M. McNAMARA,
Clerk of Council.

Approved 1st September, 1883.

W. J. BEHAN, *Mayor.*

A true copy.
C. L. WALKER,
Secretary to the Mayor.

MAYORALTY OF NEW ORLEANS,
CITY HALL, 22*nd March*, 1884.

(No. 628, council series.)

An ordinance granting permission to the Southern Brewing Company to construct and maintain a water-supply pipe from its brewery to the Mississippi river.

Be it ordained by the council of the city of New Orleans, That the Southern Brewing Company be, and it is hereby, permitted to construct and maintain a water-supply pipe from its brewery, through Toulouse street, to the Mississippi river, provided said Southern Brewing Company shall do all the work connected therewith, including the replacing of the streets, stones, and paving, under
277 the direction and to the entire satisfaction of the city surveyor and the commissioner of public works of the city of New Orleans: And provided further, That said Southern Brewing Company shall execute and sign a notarial contract, with good and solvent security, in the sum of five thousand ($5,000.00) dollars, conditioned that it shall properly restore the streets and crossings through which said pipe may pass.

Be it further ordained, That this ordinance shall take effect from and after its passage.

Adopted by the council of the city of New Orleans 18th March, 1884.

M. McNAMARA,
Clerk of Council.

Approved 21st March, 1884.

W. J. BEHAN, *Mayor.*

A true copy.
C. L. WALKER,
Secretary to the Mayor.

MAYORALTY OF NEW ORLEANS,
CITY HALL, 24 *April*, 1884.

(No. 679, council series.)

An ordinance granting permission to the firm of Ernst & Company and John Foerster to construct and maintain a water-supply — from their rice mills to the Mississippi river.

1. Be it ordained by the council of the city of New Orleans, That Messrs. Ernst & Company and John Foerster be, and they are
278 hereby, permitted to construct and maintain a water-supply pipe from their mills to the Mississippi river, provided said Ernst & Co. and John Foerster shall do all the work connected therewith, including the replacing the streets, stones, and paving, under the direction and to the entire satisfaction of the city surveyor and the commissioner of public works of the city of New Orleans: And provided further, that the said Ernst & Co. and John Foerster

shall execute and sign a notarial contract, with good and solvent security, in the sum of five thousand ($5,000.00) dollars, conditioned that they shall properly restore the streets and crossings through which said pipes may pass.

2. Be it further ordained, That this ordinance shall take effect from and after its passage.

Adopted by the council of the city of New Orleans April 15, 1884.

M. McNAMARA,
Clerk of Council.

Adopted 19th April, 1884.

W. J. BEHAN, *Mayor.*

A true copy.
C. L. WALKER,
Secretary to the Mayor.

MAYORALTY OF NEW ORLEANS, *8th August*, 1884.

(No. 809, council series.)

Resolved, That permission be, and is hereby, granted to Mrs. W. W. Carre to lay a four-inch pipe from her premises, 342 Delord street, to the new basin; this privilege revocable at the pleasure of the council.

279 Adopted by the council of the city of New Orleans August 5, 1884.

M. McNAMARA,
Clerk of Council.

Approved August 8th, 1884.

D. M. KILPATRICK,
Mayor pro Tem.

A true copy.
E. L. BOWER,
Secretary to the Mayor.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *September* 27, 1886.

(No. 1952, council series.)

An ordinance to authorize the Lane Cotton Mills to change their pipe leading to the river.

Be it ordained by the city council, That the Lane Cotton Mills be, and are hereby, authorized to substitute their pipe leading from said mills to the river with a new pipe.

Be it further ordained, That said substitution be made under the supervision of the city surveyor and the commissioner of public works.

Adopted by the council of the city of New Orleans September 21, 1886.

W. H. MICHEL,
Assistant Clerk of Council.

Approved September 27, 1886,

J. V. GUILLOTTE, *Mayor.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, *October* 30, 1884.

280 (No. 977, council series.)

Resolved, That permission be, and is hereby, granted to Messrs. Manning & Renaud to lay pipes from their refinery, Nos. 104 and 107 North Peters street, to a point on the wharf, providing the said Manning & Renaud furnish a bond in the sum of five ($500.00) hundred dollars to replace the streets in good condition; this privilege revocable at the pleasure of the council.

Adopted by the council of the city of New Orleans October 28th, 1884.

M. McNAMARA,
Clerk of Council.

Approved October 30, 1884.

D. M. KILPATRICK,
Mayor pro Tem.

A true copy.
T. H. BUISSON,
Secretary to the Mayor.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *Nov.* 10, 1880.

(No. 6714, administration series.)

Resolved, That permission be, and is hereby, granted to the Louisiana Ice Manufacturing Company to erect the necessary machinery for an ice factory on Delta street, square 3 A, bounded by Front, Delta, Poydras, and Lafayette streets, and, further, to lay two pipes (one for receiving and the other for discharging) under ground from the factory on Delta street to Poydras street, and from Poydras street direct to the river, the pipes to be twelve-inch and the river end to be so constructed as not to interfere with the landing of
281 steamboats. The streets and levee through which the said pipes are laid are to be replaced in the same good condition as before: Provided, That all the work be done under the supervision and direction of the city surveyor, and to the complete satisfaction of the administrators of commerce and improvements and the city surveyor; and the said ice manufacturing company shall give security in a bond of one thousand ($1,000.00) dollars for the faithful performance of the work and as an earnest of their intention to keep the said street and levee where the pipes are laid and the excavations made in good repair until the earth above the pipes becomes solid and is so reported by the city surveyor.

Adopted by the council of the city of New Orleans November 9, 1880.

Yeas—Behan, Chevalley, Collins, Glynn, Isaacson, Marks.

I. W. PATTON, *Mayor.*

A true copy.
N. S. ABRAMS,
Assistant Secretary.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *May* 10, 1887.

(No. 832, administration series.)

Resolved, That permission, revocable at the pleasure of the city council, is hereby granted to Messrs. McIntyre and Applegate to introduce a two-inch pipe leading from the river to the marble works of Reynolds and Jarber, foot of Washington street.

Adopted by the council of the city of New Orleans May
282 9, 1871.

(Signed) BENJ. F. FLANDERS, *Mayor.*
(Signed) H. CONQUEST CLARKE, *Secretary.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, *Dec'b'r*, 1888.

I certify that the foregoing ordinances, Nos. 8148, administration series; 7952, admin. series; 28, council series; 68, 148, 187, 342, 419, 549, 628, 679, 809, 1952, 977, council series; 6714 and 832, administration series, are true copies of the original ordinances of the respective series as above numbered, and as adopted by the council of the city of New Orleans, approved by the mayor, and duly promulgated in the official journal.

(Signed) E. L. BOWER,
Chief Clerk and Custodian of City Ordinances.

Document Marked "K," Offered by Defendant, Ordinance No. 3287, *Council Series. Filed Jan'y* 16, 1889.

MAYORALTY OF NEW ORLEANS, *October* 27, 1888.

(No. 3287, council series.)

An ordinance directing the city attorney to amend pleadings filed in the civil district court, parish of Orleans, on behalf
283 of the city of New Orleans, in case No. 15774 of the docket of the court, and entitled Edward Conery, Jr., and others *vs.* The New Orleans Water Works Company, The City of New Orleans, *et als.;* and also directing him to join in plaintiffs' demand to annul the alleged contract of the city of New Orleans under ordinance No. 909, C. S., with the water-works company as beyond the powers of the late city administration and in fraud of the rights of the city, and further directing the city attorney to proceed in said suit for the best interest of the city of New Orleans.

SECTION 1. Be it ordained by the city council of New Orleans, That the city attorney, on behalf of the city, at present a defendant of record in suit 15774 of the civil district court, entitled Edward Conery, Jr., *et als. vs.* The New Orleans Water Works Company *et als.*, be, and he is hereby, directed to amend, with leave of the honorable the civil district court for the parish of Orleans, the answer of the city of New Orleans therein, and to join in plaintiffs' demand,

and to proceed in order to cause to be vacated the alleged contract under ordinance 909, C. S., between the city and the New Orleans Water Works Company, of date October 3, 1884, before J. D. Taylor, notary, and to have the same pronounced null and void and of no effect as being detrimental to the public rights and interest, beyond the powers of the late city administration, and in fraud of the rights of the city.

284 SECTION 2. Be it further ordained, etc., That the city attorney be, and he is hereby, authorized to take such further action in pursuance of this ordinance relative to said cause No. 18774, and entitled "Edward Conery, Jr., *et als. vs.* The New Orleans Water Works Co., The City of New Orleans, and others," as he may deem necessary for the best interests of the city.

SEC. 3. Be it further ordained, etc., That all ordinances or parts of ordinances inconsistent with or contrary to the provisions of this ordinance be, and the same are hereby, repealed.

Adopted by the council of the city of New Orleans October 23rd, 1888.

(Signed) ED. T. MANNING,
Clerk of Council.

Approved October 26th, 1888.

(Signed) JOS. A. SHAKESPEARE, *Mayor.*

A true copy.

(Signed) WRIGHT SCHAUMBURG,
Secretary to the Mayor.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *January 3rd*, 1889.

A true copy of ordinance No. 3287, council series, adopted by the council of the city of New Orleans October 23d, 1888, approved by the mayor, and duly promulgated in the official journal.

(Signed) E. L. BOWER,
Chief Clerk and Custodian of City Ordinances.

285 *Document Marked "1 X," Certificate as to the Number of Shares of Stock Issued by the N. O. W. W. C. Offered by the Defendant and Filed January 16th*, 1889.

OFFICE OF THE NEW ORLEANS WATER WORKS CO.,
NEW ORLEANS, *Dec.* 19, 1888.

I hereby certify that the total number of shares of stock issued by this company is twenty thousand (20,000).

(Signed) R. L. McMURDO, *Sec'y.* [SEAL.]

Document Marked "B 1," an Ordinance to Carry Out No. 56 of the Acts of 1884, &c. Offered by Plaintiffs and Filed February 18th, 1889.

An ordinance to carry out act No. 56 of the acts of 1884, providing for a future water supply from the New Orleans Water Works Company to and for the city of New Orleans and certain institutions, and regulating the use of water and the payment thereof.

Whereas the city of New Orleans has been and is and will be unable to allow the New Orleans Water Works Company the fifty years' exemption from taxation, being the consideration for a free supply of water contemplated by section 11 of act No. 33 of the acts of 1877, and the courts having decided that the exemption from municipal taxation granted in said act is not and shall not be enjoyed, and therefore, as is also decided, that the city must pay
286 for the water supplied by said company; and whereas it is best to arrange for a fixed annual price for said water supply rather than leave the city liable to an annual demand, the amount of which cannot be known in advance, and from which the city cannot be relieved, but is specially authorized and required to provide for the payment therefor; and whereas the said New Orleans Water Works Company is willing to accept terms arranging for a sum to be determined in advance of each year, and which amount can be readily and equitably fixed, according to a mode adopted in other cities, by reference to the number of fire-hydrants, fire-plugs, or fire-wells, now numbering eleven hundred and thirty-nine (1139) in the city: Therefore—

SECTION 1ST. Be it ordained by the council of the city of New Orleans, That during the terms of the charter of the New Orleans Water Works Company, beginning with the year 1885, the supply of water for which this ordinance provides shall be furnished by the said company from the pipes and plugs of said company now laid or hereafter to be laid, for the following purposes, to wit: For the extinguishment of fires and the cleansing of gutters; for the use of all existing public buildings, public markets, public schools, and the public charitable institutions supported by the State or city and now supplied by the said company, it shall be the duty of the said company to keep and maintain a head or pressure of water of
287 not less than fifty feet head between the hours of 7 a. m. and six p. m., and the reservoir supply at night and between these hours shall be of such abundance as amply to cover the needs of the fire department for extinguishing fires; and said company shall make such provisions as may be necessary to reinforce or supplement said reservoir supply in case of need or accident. In consideration for said supply the city of New Orleans shall pay, during the term of said company's charter, to the said New Orleans Water Works Company, sixty dollars ($60.00) per annum for each and every fire-plug, fire-hydrant, and fire-well connected with the mains or pipes of said company, of which said fire-plugs, fire-hydrants, and

fire-wells there are now eleven hundred and thirty-nine (1,139), which number shall ever be the least measure of the annual sum to be paid said company, and for every additional hydrant, fire-plug, or fire-well exceeding said number hereafter attached to said pipes or mains the said city shall pay an additional sixty dollars per annum.

SECTION 2. Be it further ordained, &c., That the city of New Orleans shall have the power, by ordinance duly passed and notified in writing to said company, before each annual appropriation for said supply, to decrease or increase the number of fire-plugs, fire-hydrants, and fire-wells for the ensuing year, all such ordinances to designate the locations for the new attachments or intended
288 cut-offs: Provided, however, That the number of said fire-hydrants, fire-plugs, and fire-wells be not reduced below eleven hundred and thirty-nine (1,139), the intent thereof being that the annual price to be paid for said water supply shall never be less than as fixed herein by reference to the now existing number of said fire-plugs, fire-hydrants, and fire-wells.

SECTION 3. Be it further ordained, &c., That the city of New Orleans shall annually set apart, appropriate, and provide in its annual budgets of expenditures and receipts, beginning with those for the year 1885 and in all successive budgets for each year successively, a sum sufficient to pay for said annual water supply as fixed in the foregoing sections of this ordinance, and that said annual sum or price shall be paid to said New Orleans Water Works Company in twelve equal and monthly instalments, one on the last day of each consecutive month, beginning in the month of January, 1885, for the year 1885, and beginning also in the month of January in each year thereafter; and in event of prompt cash payments of said instalments during each year the city of New Orleans shall be entitled to deduct and retain from the last instalment in each year six per centum of the entire amount paid and payable to the said company in and for said year, but should any instalment be unpaid when due it shall bear interest at the rate of eight per centum per annum from the end of the month in which it
289 was payable until finally paid.

SECTION 4. Be it further ordained, &c., That it is hereby made the duty of the comptroller or auditing officer and of the treasurer of said city of New Orleans carefully to set apart and keep as a distinct fund the moneys or collections which shall have been appropriated in each year pursuant to this ordinance, and such proportion of all collections of the revenues as shall have been appropriated in the budgets to and for said company or the said water supply for each year shall be carefully and exactly set apart by said officers as collected, and shall be warranted for by said comptroller and paid by said treasurer to said company during each month without further direction, ordinance, or authority than that hereby given.

SECTION 5. Be it further ordained, etc., That the New Orleans Water Works Company shall have the right to inspect and examine into the use of water to be supplied under this ordinance, and the city of New Orleans and its officers shall see that no water is taken

or used except for the purposes aforesaid, and that there shall be no waste nor more water taken and used than may be actually necessary for the purposes aforesaid, and to this end the city of New Orleans shall adopt all proper measures or ordinances to prevent waste and to prevent any use of water except for the pur-
290 poses herein designated, and it is hereby made the duty of the officers of the said city and of those of any and all public buildings and public institutions and of all persons using water under this ordinance to prevent waste and to prevent the use of such water, except for the actual need for the purposes aforesaid.

SECTION 6. Be it further ordained, &c., That the mayor be, and he is hereby, authorized and directed to execute a contract by notarial act to and with said company embodying and carrying out the provisions of this ordinance.

SECTION 7. Be it further ordained, &c., That all ordinances or parts of ordinances inconsistent or in conflict with this ordinance be, and the same are hereby, repealed.

COUNCIL CHAMBER, NEW ORLEANS,
ROOM NO. 16, CITY HALL,
NEW ORLEANS, *February 15th*, 1889.

To whom it may concern:

I hereby certify the type-written document with ink interlineations, &c., amendments written with lead pencil, marked "B 2," "B 3," "B 4," "B 5," to be true and correct copies of originals in my possession.

(Signed) E. T. MANNING,
Clerk of Council.

291 MAYORALTY OF NEW ORLEANS,
CITY HALL, *February 16th*, '89.

A true copy of ordinance No. 909, council series, adopted Sept. 23rd, 1884, by the city council of New Orleans.

(Signed) E. L. BOWER,
Chief Clerk & Custodian of City Ordinances.

Document Marked "B 2," Attached to Ordinance No. 909, Amendment. Filed Febr'y, 1889. Offered by Pl'ffs.

In line 10, after the words "public markets," insert "public squares or parks." Adopted.

Document Marked "B 3," Attached to Ordinance No. 909 (Amendment). Filed February 18th, 1889, by Pl'ffs.

In line 12, after the word "supported," insert the following: "and to be established and supported." Adopted.

Document M'k'd "B 4," Amendment. Offered by Plaintiffs in Evidence and Filed Feb'y, 1889.

In line 2, after the word "power," insert the following: "in times of drouth to furnish water to such persons as may live outside the lines to the pipes of said water-works company free from all charges by the same, and shall have further power." Adopted.

Document M'k'd "B 5" (Amendment), Attached to Ordinance
292 *No. 909. Offered by Plaintiffs and Filed February 18th, 1889.*

In section 2nd, line 15, after the words "fire-well," add the following: "but the city expressly reserves the power to change the location of any and all of said plugs, hydrants, or wells whenever the council shall deem it necessary. Said changes to be at the cost of the company."

Adopted.

Sec. 2 adopted as amended.

Case Submitted.

Extract from the Minutes of Jan'y 30th, 1889.

Present: The Hon. F. A. Monroe, judge.

E. CONERY, Jr., *et als.*
vs.
NEW ORLEANS WATER WORKS CO. *et als.* } No. 15774.

On motion of Harry H. Hall, of counsel for defendant company, and by consent of counsel for all parties, this case, fixed for this day, was submitted to the court without agreement.

Reasons for Judgment.

E. CONERY, Jr., *et als.*
vs.
N. O. WATER WORKS COMPANY *et als.*

293 The defendant company was incorporated by act 33 of 1877 (extra session), the eleventh section of which reads as follows, to wit:

"That the city of New Orleans shall be allowed to use water from the pipes and plugs of said company now laid or hereafter to be laid, free of any charges, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets, and charitable institutions, and that the said company shall place, free of any charges whatever, two hydrants of the most approved construction in front of each square where a main pipe

shall be laid at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets, and cleansing the gutters, and for any other public purpose; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners. It shall be the duty of the said company whenever main pipes shall be laid to supply water for the purposes herein mentioned at all times during the continuance of this charter, and in consideration thereof the franchises and property of said New Orleans Water Works Company used in accordance with this act shall be exempt from taxation, State, municipal, and parochial."

294 Section 12 confers upon the company the right to use the public streets and to appropriate private property. Section 13 requires the company immediately after its organization to erect "new works and pipes sufficient in capacity to furnish a full and adequate supply of water, to be drawn from the Mississippi river or elsewhere as may be judged most expedient; * * * that said work shall be commenced within twelve months * * * so that within five years from the passage of this act they shall be completed so as to give an adequate supply of water to the people of the city of New Orleans," etc. By act 43 of 1878 the adequate supply of water, as provided for by the act of 1877, is construed to mean a supply at a height of fifteen feet wherever the pipes exist, and the exemption from State taxation is withdrawn. In 1881 the city authorities, conceiving that the exemption from city taxation as contained in defendant's charter was unconstitutional, sued for the tax of that year claimed to be due upon its property, works, etc.; and defendant, setting up the exemption in question as a defense to the suit, further claimed that if said exemption was not allowed by the court then that the city must pay for its water, since the obligation to furnish the water was based on the exemption from taxation and would cease to exist with the failure or withdrawal of said exemption. The amount of the tax claimed by the city was $11,484.87, whilst the value of the water furnished for the year in question was stated to have exceeded $40,000, so that upon defendant's theory the balance was largely in its favor, and its contract was an onerous

295 one, from which it was interested (to the extent of over $28,000 per annum, as matters then stood) in being released. The case was tried in this division of the court, and judgment was rendered by me in favor of the city for the amount of the tax claimed and in favor of the company for the amount claimed as the value of the water furnished. Upon appeal, however, it was held by the supreme court—

First. That the exemption from taxation was unconstitutional, and hence that the judgment of the court, *a quo* in favor of the city for the amount of said tax, should be affirmed.

2nd. That the provisions of the defendant's charter, providing for the free-water supply and for the exemption from taxation, contemplated and intended that the one should be the exact equivalent of the other, no matter how unequal they might be arithmetically.

Third. That the exemption from taxation was not, however, the sole consideration for the water supply, but that there were other considerations given besides, and hence that the withdrawal of the exemption relieved the company of its obligation to furnish water free of charge only *pro tanto*—that is to say, only to the extent of the amount of the tax which might be claimed, to which extent it was held that the city should pay for the water furnished. The judgment in question was rendered in 1884, and its meaning and
296 effect was, as to the particular case before the court, that the city should recover the amount, $11,484.87, claimed for the tax of 1881, and that upon its paying the city $40,000 for the value of the water furnished in said year the defendant should have judgment in an amount equal to that awarded the city for its tax, to wit, $11,484.87, but that with respect to the balance of the defendant's said claim there should be no recovery, its obligation to furnish free water under its charter having been affected by the withdrawal of the exemption from taxation only to the extent of the amount of the tax claimed and collected from it.

In a short while after the rendition of this judgment the Legislature passed an act, 56 of the session of 1884, approved July 7, the main spirit of which appears to have been to authorize and require the city, in any case where it exacted taxes from the company, to pay the value of the water furnished in the year for which the taxes should be so exacted. There is something said in the act about a supply of filtered or clear water which need not be considered here, as it has no bearing upon any issue in this case. The fifth section, however, provides that "nothing in this act shall be construed as in any manner abridging or in otherwise affecting any of the rights, franchises, and privileges heretofore granted to said company, but all such rights, franchises, and privileges shall continue and belong to said company."

297 And this provision is important in view of article 245 of the constitution, which provides that "the General Assembly shall not remit the forfeiture of the charter of any corporation now existing or renew, alter, or amend the same, nor pass any general or special law for the benefit of said corporation except on the condition that said corporation shall thereafter hold its charter subject to the provisions of this constitution."

The act in question is obviously a special law for the benefit of said corporation (meaning the defendant), and if the defendant accepts its benefits it must do so subject to the constitutional provisions which have been quoted, but this the defendant appears unwilling to do, and the act itself, in the fifth section, which has been quoted, seems to provide distinctly that no interpretation shall be given to it which, by subjecting it to the dominion of the constitution, might endanger the grants contained in it. In view of the provisions of article 57 of the constitution, however, it appears to me immaterial whether the act in question is accepted or not, as it would be equally inoperative in either case.

That article reads as follows, to wit: "Art. 57. The General Assembly shall have no power to release or extinguish or to authorize

the releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to this State or to any parish or municipal corporation therein: Provided,
298 That as to confiscated property may be released of all taxes due thereon at the date of its reversion to them."

From the facts as presented in this case and in the case we quoted in the 26th annual it appears that the amount of water which the defendant is bound under its charter to furnish to the city far exceeds in value the amount of taxes which are exacted from it, and yet, under the decision which has been quoted, the obligation to furnish the water still subsists, subject only to the qualification that compensation equal in amount to the taxes exacted may be claimed, whilst in so far as the water exceeds such taxes in value it must be furnished free of charge. It therefore follows that in requiring the city to pay for all the water which it gets (in the event of its demanding the tax), and in providing specially that unless it sets apart a sufficient sum to make such payment the company shall not be compelled to deliver water as provided in its charter, the Legislature is releasing or extinguishing an obligation which has been ascertained and defined by the supreme court of the State from the defendant company to the city of New Orleans within the meaning of the constitutional provision.

My conclusion upon this point, therefore, is that the defendant company, declining to accept or refusing to admit its acceptance of the act 56 of 1884, and failing to waive the stipulation in sec-
299 tion 5 of said act, supposing such waiver to be competent, is not entitled to claim the benefits contemplated by said act, and that the act in question, if otherwise operative, would release the defendant from an obligation of great importance to the city of New Orleans, and hence is violative of article 57 of the constitution. After the passage of the act which I have thus referred to, to wit, in September, 1884, the city council passed an ordinance authorizing a contract to be made between the city and the defendant for the carrying out of the ideas expressed in said act. In fact, the ordinance bears the title "An ordinance to carry out act No. 56 of the acts of 1884, providing for a future water supply from the New Orleans Water Works Company to and for the city of New Orleans, the use of water, and the payment therefor."

And agreeably to its provisions a contract was entered into whereby the city agreed to pay for all the water to be furnished by the company during the term of its charter (say fifty years from 1877), and whereby it was stipulated that the minimum number of fire-plugs for which payment should be made (at the rate of $60 each) should be 1,139, so that the least that the city can hope to get off with is over $6,800 per annum, whilst the actual amount which she may be required to pay may exceed that sum.

It would seem sufficient to say that an ordinance and contract passed and made for the avowed and expressed purpose of carrying out an unconstitutional act of the Legislature could not be given effect. It is said, however, that the act in question is wholly
300 immaterial to the ordinance and contract which were so

passed and made, and that they can stand without the aid of said act, even though their only declared purpose was to carry it out.

Assuming this position to be tenable in the abstract, it cannot be maintained in this particular case for the reasons—

That the purpose and effect of the contract made between defendant and the city, as disclosed not only by the title of the ordinance pursuant to which said contract was made, but by the context of said ordinance and said contract, construed in the light of the facts disclosed upon the trial of the case, were to carry out said act of the Legislature with some conditions of additional stringency as to the city of New Orleans.

That the city of New Orleans has no power, whether directly or indirectly, to give away money collected from the tax-payers, and the payment of many thousands of dollars per annum for that for which the supreme court of the State has decided nothing need be paid is in legal contemplation a gift, no matter in what shape it may be disguised.

Before this case came into my hands the supreme court had decided upon appeal from a judgment rendered by the judge presiding at that time in division "E" that the plaintiffs have a standing in court for the purposes of the suit. The court said, quoting the language of its own opinion in another case, "Tax-payers have a standing in court to contest upon proper charges the validity of a
301 municipal ordinance and contract executed under it whenever its enforcement may increase the burden of taxation."

This ruling, originally made in the case of "Handy *et al. vs.* City *et als.*," and thus affirmed, relieves me of the necessity of any elaborate consideration of the question as to when, where, and how a citizen and tax-payer or the courts can or will interfere in a contract between a municipal corporation and a contractor. The ruling in question was made in this case and upon the identical petition which is now before me, so that no more may be said upon that subject, save that the facts and law of the case as developed upon the trial upon the merits so far correspond with the averments of the petition as to justify the rendition of the judgment prayed for, which will therefore be rendered.

In Accordance with the Above Opinion, Judgment.

Civil District Court, Division "C."

EDWARD CONERY *et als.*
vs.
N. O. WATER WORKS COMPANY *et als.* } No. 15774.

This cause having been regularly assigned for trial at this term, and the same having been duly tried and taken under advisement by the court—

302 For the reasons assigned in the written opinion of the court this day delivered and filed, and the law and the evidence being in favor of the plaintiffs and against the defendants—

It is ordered, adjudged, and decreed that the notarial contract entered into between the city of New Orleans and the New Orleans Water Works Co. on October 3rd, 1884, before Jos. D. Taylor, and also ordinance No. 907, council series, adopted September 23rd, 1884, on which the said contract purports to be made, and also act No. 56 of the acts of the Legislature of the State of Louisiana of the session of 1884, the provisions of which the said ordinance No. 909 purports to execute, are unconstitutional, null, void, and of no effect or validity.

It is further ordered, adjudged, and decreed that the city of New Orleans and its officers and servants and the New Orleans Water Works Company and its officers be, and they are hereby, perpetually enjoined, prohibited, and restrained from setting up the said contract or the said ordinance or the said legislative act or any part thereof to be valid and binding on the city of New Orleans, and that the city of New Orleans and its officers be perpetually enjoined, prohibited, and restrained from making any appropriation under said notarial contract or under the said ordinance or under
303 the said act or any appropriation to the New Orleans Water Works Company in payment of its water supply in any year in excess of the amount of the annual taxes which may be assessed against it for that year by the city of New Orleans.

It is further ordered, adjudged, and decreed that the defendants do pay the costs of this proceeding.

Judgment rendered February 4th, 1889.

Judgment signed February 6th, 1889.

(Signed) F. A. MONROE, *Judge.*

Consent to Signature to Judgment. Filed February 6th, 1889.

E. CONERY & Others
vs.
N. O. WATER WORKS CO. } No. 15774.

It is hereby agreed that the delays for the application for a new trial herein be waived, and that the judgment be signed without further delay.

(Signed) W. B. SOMMERVILLE,
Ass't City Att'y.
C. HUNT, *City Att'y.*

New Orleans, La., Feb'y 5, 1889.

Consent for Signature to Judgment. Filed February 6th, 1889.

E. CONERY, Jr., *et al.*
vs.
N. O. WATER WORKS Co. } No. 15774.

304 It is hereby agreed that the delay for signing the judgment herein be waived, and that said judgment be at once signed.

(Signed) J. R. BECKWITH,
" GUS A. BREAUX,
" HARRY H. HALL,
For Def't.
" EDGAR H. FARRAR,
For Plaintiffs.

Motion for Appeal. Extract from the Minutes of February 7th, 1889, and Filed February 7th, 1889.

ED. CONERY, Jr., *et al.*
vs.
N. O. WATER WORKS Co. & *als.* } No. 15774, Division "C."

On motion of J. R. Beckwith, Gus A. Breaux, and Harry H. Hall, of counsel for defendant, The Water Works Co., and on suggesting that a final judgment has been rendered herein against the defendant on the 4th day of February, 1889, and signed on the 6th day of February, 1889, by consent waiving delays; that mover is aggrieved thereby, and that there is error in said judgment to mover's prejudice, and that it desires to appeal therefrom suspensively; that mover's interest affected by said judgment largely exceeds $2,000—

305 It is ordered that a suspensive appeal be allowed herein to the New Orleans Water Works Co., returnable to the supreme court of the State on the third Monday of February, 1889, upon mover's furnishing bond according to law in the sum of one thousand dollars.

New Orleans, La., Feb'y 6th, 1889.

Appeal Bond. Filed February 8th, 1889.

E. CONERY, Jr., *et als.*
vs.
THE N. O. WATER WORKS Co. & *als.* } No. 15774.

Know all men by these presents that the New Orleans Water Works Company, as principal, and Albert Baldwin, as surety, are held and firmly bound unto Luminais, clerk of the civil district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of one thousand dollars; for the payment whereof

we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated in the city of New Orleans on this 7th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-bounden New Orleans Water Works Company has this day filed a motion of appeal from a final judgment rendered against it and the city of New Orleans in the suit of E.
306 Conery, Jr., &. *al. vs.* The New Orleans Water Works Co. & *als*, No. 15774 of the civil district court for the parish of Orleans, on the 4th day of February, 1889, and signed on the sixth day of February, 1889:

Now, the condition of the above obligation is such that the above-bound New Orleans Water Works Company shall prosecute its said appeal and shall satisfy whatever judgment may be rendered against it, or that the same shall be satisfied by the proceeds of the sale of its estate, real or personal, if it be cast in the appeal; otherwise that the said surety shall be liable in its place.

(Signed) R. E. CRAIG,
President N. O. Water Works Co. [SEAL.]
(Signed) A. BALDWIN. [SEAL.]

Certificate.

STATE OF LOUISIANA,
Civil District Court for the Parish of Orleans:

I, Edgar A. Luminais, clerk of the civil district court for the parish of Orleans, do hereby certify that the foregoing three hundred and eighty-five pages do contain a true, correct, and complete transcript of all the proceedings had, documents filed, testimony and evidence adduced upon the trial of the cause, wherein Edward Conery, Jr., *et als.* are plaintiffs and New Orleans Water Works Co. and City of New Orleans are defendants, instituted in this court and now in the records thereof under the No. 15774.

In testimony whereof I have hereunto set my hand and
307–438 affixed the impress of the seal of the said court, at the city of New Orleans, on this nineteenth day of March, in the year of our Lord one thousand eight hundred and eighty-nine, and in the one hundred and thirteenth year of the Independence of the United States of America.

E. A. LUMINAIS, *Clerk.*

439 Mr. Justice POCHE dissenting:

A second examination of this case and a careful study of the position taken by counsel representing the defendant company have led to the conclusion that we had erred in a portion of our first opinion and in the decree rendered. Hence I think that a rehearing should have been granted. There is and there can be but one opinion as to the nullity of the exemption of taxation, and that therefore the tax claimed by the city must be enforced.

But the very reasoning which leads to that conclusion should, in my opinion, carry with it a declaration of the complete nullity of the contract, of which the tax exemption was one of the considerations, unless it can be made to appear that the act provides for or contemplates other and distinct considerations for the stipulated free supply of water to the city by the defendant company.

In my opinion the reverse of that proposition clearly appears from a proper construction of the true meaning of section 11 of the act (No. 33 of 1887), which is the only section or part of the act in which reference is made to the free supply of water to the city.

440 In that section, after providing that the city of New Orleans shall be allowed to use water free of charge for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets, and charitable institutions, the law-maker used the following explicit and unambiguous language: "It shall be the duty of the said company, wheresoever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter; and in consideration thereof the franchises and property of said New Orleans Water Works Company used in accordance with this act shall be exempt from taxation," etc.

It cannot be successfully denied that the "purposes herein mentioned" in the last part of the section refer to the free supply of water for the extinguishment of fires, cleansing of the streets, and for the use of all public building, public markets, and charitable institutions.

441 There is no other language or provision in the act to which this reference could possibly apply. The language used fills out the continuation of a leading idea and the conclusion of a stipulation which is the main feature of the section. It could, therefore, refer to no other purposes already mentioned in the act or to be mentioned further on. That being the case, there is less doubt as to the subject-matter to which the subsequent words, "and in consideration thereof," refer to. It is more than plain that they refer to the corresponding obligation of the company to supply water free of charge for the purposes "herein mentioned." Hence the section must have been intended to and it does beyond a doubt create a complete and independent contract between the city and the company. The contract, as thus shaped and created, has reference to no other portion of the act which is complete as an act without the contract contained in the section—as complete as the contract itself stands without any reference to any or to all of the other provisions of the act.

442 Hence follows, in my opinion, the irresistible conclusion that, the consideration furnished by one of the contracting parties having utterly failed, the entire contract must fall.

I have carefully, but in vain, sought for any other consideration in the act which the city is made to contribute in compensation of the free water supply stipulated in its favor by the provisions of the eleventh section of the act.

There is no force in the suggestion that such a consideration is

found in the valuable prerogatives and exclusive privileges conferred to the company. No language in the act justifies such a conclusion. On the contrary, language may be found which excludes even the implication that the act contemplated a free supply of water to the city for any other consideration than that stipulated in section 11. Thus we find that section 5 provides: "That the said water-works company shall own and possess the privileges acquired by the city of New Orleans from the Commercial Bank; that it shall for fifty years — the exclusive privilege of supplying the city of New Orleans and its inhabitants with water, etc."

By this plain and unambiguous language the city is placed
443 on exactly the same footing as "its inhabitants," and is to be regulated by the same laws of supply and demand. In the case of The Water Works *vs.* Sugar Refinery we recently expounded the meaning of the privilege conferred by that section and we restricted the scope of its meaning to "selling" "water." Besides, the obligation which rests on all large cities to supply their inhabitants with water, coupled with the fact that the city was anxious to be ridden of the burden which she had inherited from the Commercial Bank, were serious and sufficient considerations for the charter to a corporation which furnished its own means for such a vast, useful, and indispensable enterprise and paid the city the full value of the franchises transferred to it.

The grant of exclusive privileges was guarded and checked by the reserved power of controlling the company's charges and in limiting the rate of its annual revenues, as shown by the provisions of section 15 of the act.

It is therein provided that the net profits of the company shall not exceed ten per cent. per annum, and that in order to reg-
444 ulate this matter the city council, through a committee, shall have access to the books of the company, and that in case of a revenue in excess of the limitation the city council shall have the power to reduce the rate of charges for water supply so as to accomplish the end proposed, and it is also provided that the company shall not exact charges exceeding those now paid by the city, reserving to the latter the power of enforcing compliance by the writ of mandamus. The whole tenor of the act distinctly conveys the conclusion that, with the exception of the provisions contained in section 11, the city has no greater privileges in the matter of water supply than all other consumers of water within her limits, and that *quoad* this company she occupies precisely the same position which she has always held towards the gas company or any other corporation created for the purpose and vested with the power of furnishing any commodity to "the city and its inhabitants."

445 For those reasons I respectfully dissent from the conclusions of my associates of the majority.

Todd, *J.*, concurs in this opinion.

446 UNITED STATES OF AMERICA,
State of Louisiana:

Proceedings Had in the Supreme Court of the State of Louisiana.

EDWARD CONERY, Jr., *et al.*
versus
THE NEW ORLEANS WATER WORKS CO. *et al.* } No. 10334.

Transcript of appeal. Filed March 19th, 1889.

Motion for Time and Order. Certificate. Filed February 18th, 1889.

E. CONERY, Jr., *et als.*
vs.
NEW ORLEANS WATER WORKS CO. *et als.* } No. 10334.

On motion of J. R. Beckwith, G. A. Breaux, and Harry H. Hall, of counsel for defendant, and on suggesting that the appeal herein
447 is made returnable on this the 18th day of February, 1889, and that, as appears by the annexed certificate of the clerk of the court and by the affidavit of counsel, it was impossible to complete said record in time for said return day, and that said failure to complete was not due to the defendant or its counsel, and that a further extension of 15 days is necessary in order to complete said transcript—

It is ordered that the return day of the appeal herein be extended to Monday, March 4th, 1889, and for all general relief.

Harry H. Hall, being sworn, says that the failure of the clerk to complete the transcript is due solely to the short interval of time between the granting of the appeal and the return day; that defendants' counsel have made every endeavor to have said transcript ready and have been guilty of no neglect whatsoever.

(Signed) HARRY H. HALL.

Sworn to before me this 18th of March, 1889.

(Signed) E. A. LUMINAIS, *Clerk.*

Certificate.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

E. CONERY, Jr., *et als.*
vs.
N. O. WATER WORKS CO. *et al.* } No. 15774.

Edgar A. Luminais, clerk of the civil district court for the parish of Orleans, being duly sworn, deposes and says that the transcript of appeal in the above entitled and numbered cause, returnable to the supreme court of the State of Louisiana on the 3rd Monday of Feb-

ruary, 1889, has not been completed for the reason that the transcript of appeal is a voluminous one, and that an additional delay of 15 days from this date is necessary for him to complete the same.

448 (Signed) E. A. LUMINAIS, *Clerk.*

Sworn to and subscribed before me this 15th day of February, 1889.

(Signed) TH. BUISSON,
Deputy Clerk of the Civil District Court for the Parish of Orleans.

Motion for Time and Order.

Extract from the Minutes of February 18th, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

EDWARD CONERY, Jr., *et al.*
vs.
NEW ORLEANS WATER WORKS CO. *et al.* } No. 10334.

On motion of Harry H. Hall, Esq., of counsel for defendants and appellants, and upon exhibiting the certificate of the clerk of the lower court, and on suggesting to the court that said transcript had not been completed, it is ordered that the return day for the filing of said transcript be extended for ten days.

Motion for Time and Order. Certificate. Filed February 27th, 1889.

449 E. CONERY, Jr., *et al.*
vs.
NEW ORLEANS WATER WORKS CO. *et al.* } No. 10334.

On motion of Beckwith, Breaux, and Harry H. Hall, of counsel for defendant, The N. O. Water Works Co., and on suggesting that, as appears by annexed affidavits, a further delay of 20 days is necessary for the completion of the transcript herein, and that defendant is not in fault—

It is ordered that an extension of Friday, the present return day, viz., March 4th, 1889, be had of 20 days, and said return day be extended to Monday, March 25th, 1889.

Harry H. Hall, being sworn, says that def'd't, The N. O. Water Works Co., has done all in its power to — the completion of this record, and has not been guilty of — or neglect in its premises.

(Signed) HARRY H. HALL.

Sworn to before me Feb. 27th, 1889.

(Signed) JOSEPH F. POCHE, *Clerk.*

Certificate.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

E. CONERY, Jr., *et al.*
vs.
N. O. WATER WORKS CO. *et al.* } No. 15774.

I, Alexander Lesseps, deputy clerk of the civil district court for the parish of Orleans, being duly sworn, deposes and says that the transcript of appeal in the above entitled and numbered cause, returnable to the supreme court of the State of Louisiana on the 3rd Monday of February, 1889, has not been completed for the reason that the transcript of appeal will contain about four or five hundred pages, and that an additional delay of twenty days from this
450 date is necessary to enable him to complete the same.

(Signed) A. LESSEPS,
Deputy Clerk.

Sworn to and subscribed before me this 26th day of February, A. D. 1889.

(Signed) E. A. LUMINAIS,
Clerk of the Civil District Court for the Parish of Orleans.

Motion for Time and Order.

Extracts from the Minutes of March 6th, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

EDWARD CONERY, Jr., *et al.*
vs.
NEW ORLEANS WATER WORKS CO. *et al.* } No. 10334.

On motion of Harry H. Hall, of counsel for defendants and appellants, and upon exhibiting the certificate of the clerk of the lower court, and on suggesting to the court said transcript had not been completed, it is ordered that the return day for the filing of said transcript be extended for twenty days.

(Copy.)

Motion to Continue. Filed March 21st, 1889.

E. CONERY, Jr., *et al.*
vs.
THE NEW ORLEANS WATER WORKS CO. *et al.* } No. 10334.

451 On motion of E. H. Farrar, att'y for plaintiffs, and on suggesting to the court the fixing of this cause for April 9th by

the city attorney, and on further suggesting that this case grows out of the case of The City of New Orleans *vs.* The N. O. Water Works Co., now on appeal in the Supreme Court of the U. S., standing as No. 339 on the docket of the present term of that court, which will be reached for trial in the month of May, and that this cause ought to await the decision of that cause—

It is ordered by the court that the defendants do show cause on Saturday, the 23rd day of March, at 11 o'clock, why this case should not pause and be continued until the Supreme Court of the United States have passed on the writ of error taken by the water-works Co. to the judgment of this honorable court in the case of The City of N. O. *vs.* The New Orleans Water Works Company.

Notify Carleton Hunt, city att'y, and H. H. Hall, for water works.

Motion to Continue.

Extracts from the Minutes of March 21st, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

EDWARD CONERY, Jr., *et al.*
vs.
NEW ORLEANS WATER WORKS CO *et al.* } No. 10334.

On motion of E. H. Farrar, Esq, of counsel for plaintiffs, and for reasons assigned, it is ordered that defendant show cause on April 9th, 1889, why said cause should not be continued indefinitely.

452 *Motion to Postpone Overruled.*

Extracts from the Minutes of March 25th, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Samuel D. McEnery, associate justices.

Absent: His honor Lynn B. Watkins, associate justice.

EDWARD CONERY, Jr., *et al.*
vs.
NEW ORLEANS WATER WORKS CO. } No. 10334.

In this case, the motion to postpone the argument and decision until after the determination of the case in the U. S. Supreme Court having been heard, E. H. Farrar, Esq., for mover; Harry H. Hall, Esq., for defendant, and Carleton Hunt, Esq., for the city, it is ordered that the motion to continue be declined; that the case remain fixed for the 9th of April next, the court thereafter to exercise its own judgment touching the time of deciding it.

Continuance.

Extracts from the Minutes of April 9th, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice;
453 Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

EDWARD CONERY, Jr., *et al.*
vs.
NEW ORLEANS WATER WORKS CO. } No. 10334.

This case was called for trial, and, after having heard argument of E. H. Farrar, Esq., for pl'ff and appellee, and Carleton Hunt, Esq., for the city, the same was continued for further argument to to-morrow.

Cause Submitted.

Extracts from the Minutes of April 10th, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

EDWARD CONERY, Jr., *et al.*
vs.
NEW ORLEANS WATER WORKS CO. *et al.* } No. 10334.

This case, continued for argument, was called for trial, and, after hearing argument of Gus A. Breaux, Esq., and J. R. Beckwith, Esq., for defendant and appellant, and E. H. Farrar, Esq., for pl'ff and appellee, the same was taken under advisement by the court.

454 *Reasons for Judgment.*

ED. CONERY *et als.*
vs.
NEW ORLEANS WATER WORKS CO. and CITY OF NEW ORLEANS. } No. 10334.

Mr. Justice MCENERY:

Ed. Conery and other tax-payers, residents of the city of New Orleans, brought suit against The New Orleans Water Works Co. and The City of New Orleans to have the existing contract for the supply of water to the corporation to be declared a nullity.

They aver they are tax-payers of New Orleans in amounts aggregating ten thousand dollars. They recite the history of the present charter, the obligation growing out of the city's attempt to subject

the property of the corporation to taxation, and the judgment in the case of The City of New Orleans *vs.* The Water Works Co., reported in 36 An., p. 432, and that the supreme court interpreted the legislative contract contained in act 33 of 1877, which is the charter of said company, and that the water-works Co. had no power to receive from the city any greater amount for a free supply of water than the sum of $11,484.87, allowed the company on its reconventional demand in that suit as an equivalent. They allege the city had no authority to make the contract; that the contract is *ultra vires*, null and void, illegal, and unconstitutional.

They also aver that after the termination of the suit of New Orleans *vs.* Water Works Co. the company, not satisfied with the judicial construction placed upon its charter, in order to obtain an unjust advantage over the city, procured the enactment of act 56
454½ of 1884, and that, pretending to act under this statute, the city council of New Orleans passed ordinance No. 909, ordering the mayor of said city to enter into a contract with the water-works Co., and that said ordinance 909 and the contract made in pursuance thereof were not authorized by the terms of act 56 of 1884, and that the Legislature never intended that the contract relations as interpreted by the supreme court should be changed or modified unless for the purpose of furnishing the city with clear and filtered water, and that if said act contemplated a contract between the city of New Orleans and the water-works Co. as to the nature of the water to be supplied, then said act is unconstitutional and void and conflicts with articles 45, 57, 234, 46 of the constitution of the State.

The petition prays for an injunction.

The city of New Orleans filed an exception to the petition (1) that the plaintiffs' petition disclosed no legal cause of action; (2) that the plaintiffs disclosed no interest or authority to institute and maintain the suit, and prayed that it be dismissed. Some years after this exception was filed, on a change of the city administration, the attorney of the city appeared and joined the plaintiffs in this suit. Complaint is made of this change of front on the part of the city, and it is allowed that the city is estopped from filing a contrary plea. While this may be true as to the city in its corporate and political capacity, it cannot operate on the plaintiffs—tax-payers—who allege the nullity of the contract.

The company also filed an exception alleging several grounds for the dismissal of the suit, some of which are identical with the exception filed by the city; but they are so intimately associated with the merits of the case that we will not disturb the order of the district judge in amending the exceptions.

455 The water-works Co. filed an answer pleading a general denial, and also a supplemental answer alleging other matters, all of which, however, are summed up in maintaining the integrity of the contract, the authority of the city to make the contract, independent of act 56 of 1884, and the constitutionality of said act, and the validity of ordinance 909, and the contract made in pursuance thereof.

There was a judgment in favor of the plaintiffs, and the water-works Co. has appealed.

The city of New Orleans purchased from the Commercial Bank the water-works property and franchises. The city undertook to supply the inhabitants of the city and her other wants with water. The experiment was disastrous, and her experience was that of all great municipal corporations which have attempted this scheme, an insufficient supply of water, debt through extravagant and bad management, and complaints from her citizens. To rid herself of this incumbrance the city appealed to the Legislature for relief, and at her instance and in answer to her prayers the present company was composed under the direction of her officers in pursuance of act 33, E. S. of 1877. Section 11 of that act is as follows:

Be it further enacted, etc., That the city of New Orleans shall be allowed to use water from the pipes and plugs of said company, now laid or hereafter to be laid, free of any charge for the extinguishment of fires, cleansing of streets, and for the use of all public buildings, public markets, and charitable institutions, and that the said company shall place, free of any charge whatever, two hydrants of the most approved construction in front of each square where
456 a main pipe shall be laid, at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets and cleansing the gutters, and for any other public purpose; that on the squares that do not front on the river hydrants shall be placed on the opposite sides of the streets, at an equal distance from each other, at the corners. It shall be the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter, and in consideration thereof the franchises and property of said New Orleans Water Works Co. used in accordance with this act shall be exempted from taxation, State, municipal, and parochial.

For several years the company supplied the city with water and no tax was demanded from the company. In 1881 the city brought suit against the company for taxes assessed against the company, amounting to $11,484.87.

The company claimed that if it had to pay the tax the city was bound to pay for the amount of water supplied under the above section, and recovered for the sum of $40,281.87.

There was judgment for the taxes due the city and in favor of the company on the reconventional demand for the exact amount of the taxes as equivalent for the water already furnished the city. City of New Orleans *vs.* Water Works Co., 36 An., p. 432.

It is contended by plaintiffs that the decree in the case fixed and determined the respective obligations of the city of New Orleans and the water-works Co. and regulated the future supply of water to the city and the amount which the city should pay annually for its supply of water, the amount of the taxes assessed against the company as fixed in said suit. In this case the sole question was whether or not the property of the company was exempted from taxa-
457 tion, and it involved the determination whether or not sec.

11 of act 33 of 1877 was void as being in conflict with the constitution of 1868.

Under the issues presented the court could not interpret the legislative contract a charter of the company in its interests, because the only question was as to the nullity of one section of the act. If found up to the date of the suit an executed contract to deal with, the consideration of which was illegal, it declared the illegality of the consideration and ordered the amount paid on account of it to be returned to the party who had paid his part of the obligation.

The contract with the city was that for furnishing water without specifying the amount. The city would not collect taxes from the company. The company furnished the water and the city refused to allow the tax. The judgment annulled the contract and returned to the water-works company the value of the water which they had furnished and which had been fixed in the contract annulled at $11,484.87 as the only consideration for exemption from the city taxes. To say that the decision in that case regulated the contract of the parties in the future as to the price of the water to be furnished by the water-works Co. would be to maintain that this court has made a contract for the parties which they never intended and which is not warranted by any promises in the water-works Co. charter.

The contract between the city and the water-works company was made directly by the State at the solicitation of the city. The State withdrew the privilege of exemption from State taxation, which in amount equalled the city taxes. Thus one-half of the consideration was withdrawn by the State without giving any equivalent. To have fixed the price of the water to be furnished at the exact
458 amount allowed the company in its reconventional demand would have been unjust. The company now pays in taxes twice the amount found to be due on the reconventional demand. If the increase has been so great in so short a time it is reasonable to suppose that the increase will be in greater ratio in the future, with the acquisition of additional property by the company, the increase in the value of its present property, with the improvement and advancement in the commercial prosperity of the city which is so confidently predicted and expected. From this it will appear how inequitable it would have been had the decree arbitrarily fixed an amount to be paid by the city for her water supply. It would have been an amount never contemplated by the Legislature when it made the contract for the city and the company.

The effect of the judgment in the case was to destroy and annul sec. 11 of act 33 of 1877, E. S. One may look in vain in another paragraph or section of the act for any obligation, express or implied, which compels the water-works company to furnish free water to the city for any franchise or privilege granted by the State. The water-works company is, as aforesaid, at the instance and invitation of the city and by authority of law. The city cannot impose any obligation upon it contrary to the original grant without its consent. To impose upon it an onerous duty not contained in the charter would be a violation of State and Federal Constitution. There is

no provision in the charter requiring it to furnish water to the city at any stipulated or regulated price. In the case of The City of New Orleans *vs.* T. T. Co., 40 An., p. 42, there was almost a similar state of facts. The city had by grant induced a telephone company to establish an expensive plant and gave it certain privileges to erect its poles. Afterwards she attempted in certain localities to put a
459 charge upon 600 of defendant's poles at $5 per pole. There was judgment for the company, this court deciding that the company was protected by the constitutional right against the impairment of its contract. In the instant case the city promoted the organization of the water-works Co. and now seeks to impose upon it an obligation not warranted by its charter.

"Obviously," said the court in the telephone case, "upon the closest consideration of law and justice, the grant of authority to defendant when accepted and acted upon became an irrevocable contract, and the city is — powerless to set it aside as to interpolate new and more onerous considerations therein. Such has been the well-recognized doctrine since the Dartmouth College case, 4 Wheat., 518." In this case we have affirmed the principles resting upon the Dartmouth College case, under which corporations have protected their rights and franchises, the titles to and uses of property, safely from any alteration or impairment of their rights and freedom from increased public burdens. It has become fixed in jurisprudence by reported affirmations for over sixty years, and has become tenable because announced and maintained during the period by the highest judicial tribunal in the land through a succession of judges eminent for learning and purity of character. It would not yield to a persistent local popular clamor and will not be reasoned to satisfy local prejudice and sentiment.

R. Am. B. Ass., vol. 9, p. 229.

In Von Hoffman *vs.* Quincy, 4 Wall., 535, Mr. Justice Davies said: "The security of property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be
460 forsaken. A departure from it now would involve dangers to society not to be foreseen, would black the sense of justice of the country, and weaken, if not destroy, the respect which has always been felt for the judicial department of the Government."

To place the construction upon the decree in the case of The City *vs.* W. W. Co., 36 An., p. 432, contended for by plaintiffs, would be to impose an obligation upon the company not warranted by its charter and would be in violation of both the State and Federal Constitution.

It will be unnecessary to go into the specific details of the existing contract of the city with the water-works Co. If the city had the power to make the contract and confine herself within the limit of this power the quantity and kind of water, the price *and* etc., were matters within the legislative discretion of the city council, and when

this is found in the execution of the contract courts will not inquire into this discretion.

Dillon on Municipal Corps., vol. 1, p. 121.

Atlantic City Water Works Co., *vs.* Reed (N. Y. 115), A., 10; 31 Ala. Re., 545; 97 Ind. Re., p. 2.

When the common council of a municipal corporation is vested with full power over a subject and the mode of the exercise of such power is not limited by the charter it may exercise it in any manner most convenient.

(Or.) R. P., 835.

And when a municipality has power under its charter from the Legislature to obtain a supply of water for fire and domestic purposes it will not be injoined from levying a tax to increase its supply when it is alleged to be ample. The extent of the use of such
461 power rests in its discretion, and the question of expediency is for the municipality and not for the courts.

Lucia *vs.* Village of Montpelier (Vt.), A., 321.

In the case of Handy *et als. vs.* City of New Orleans, 39 An., 107, this court said:

"The serious charge is, after all, that the city, in the exercise of the police power, has maladministered the public thing respecting the lease of her wharves. Under such circumstances can the petitioners be heard?

If it could be questioned whether the city in the exercise of the police power, which is inherent in all municipal corporations, could build and keep wharves and exact compensation for the use of the facilities derived from them by those enjoying the same, or convey and transfer unto another that right, all discussion on the subject would be at once hushed by the positive and express delegation of authority in that respect made to the city by the sovereign in the charter under which it breathes, moves, and acts.

"It is apparent that the city was formerly vested by the Legislature with the power of administering by herself or by the agency of others the wharves and landings dedicated to commerce.

"There can be no doubt, then, that what the city has done in this regard in the exercise of the police power can no more be questioned than if the State herself had acted directly."

In approving the doctrine expressed in Municipality *vs.* Pease the court said: "The correctness of the ruling and the soundness of the views therein are not questioned, but the material fact on which the same rests must not be lost sight of." The fact referred
462 to by the court was that in the power delegated to the municipality there was no restraint imposed upon its *discussionary* use; and, in the language in Municipality *vs.* Pease, "the remedy for this can be had elsewhere than from the judicial power"—in the intelligent exercise of electoral power devoted to legislative action to compel the municipality to confine itself within fixed limits.

The case of Handy *vs.* N. O. was remanded to be tried on the merits solely because the corporation of New Orleans had transgressed the

mandatory prohibitions of its charter. In the opinion the court said: "Courts in passing upon such matters ought to do so with great caution and with regard to the legal *discussion* which the sovereign may have vested in such corporations." The case for which tax-payers can attack the acts of the municipality are succinctly and well defined in this case.

Handy *et als. vs.* N. O., 39 An., 10.

It is not, therefore, even a contract nor the details of contracts involving the exercise of vested *discussion* in the municipality that can be attacked by the tax-payers outside of and independent of the civil corporation.

To authorize such a cause would be to put an end to organized local government, and to vest the powers of municipal government in the hands of every irresponsible, self-constituted committee, noisy demagogues, and professional tax-resisters. Under such a system there could be no progress, improvement, or advancement; there would be no well-paved streets and proper sewerage or the inauguration of effective sanitary methods.

Every act, contract, and every exercise of legal *disorder* would inevitably be brought up for judicial investigation. Delay
463 and disorder would follow in the track of fruitless litigation.

There is no proof in the record of any fraud or undue advantage obtained by the water-works Co. over the city. The motives which prompted the members of the Legislature to pass act 56 and of the members of the council in passing ordinance No. 909 are beyond the power to investigate.

Dillon on Municipal Corp., vol. 1, p. 326.
Baird *vs.* Meyer, 96 N. Y., 567.
Villavasso *vs.* Barthlet, 39 An., 247.

The only questions furnished, therefore, are "Did the city of New Orleans have the power to make the contract, and, if she had the power, has she executed any restraints *unpaid* upon her? And these will involve an inquiry into the power of the city in the exercise of its police powers to make the contract, and to the constitutionality of act 56 of 1884 and the validity of ordinance No. 909 and the legality of the contract.

A municipal corporation possessed and can exercise the following powers: 1, those granted in express words in the charter; 2, those necessarily and fairly implied in an incident to the powers expressly granted; 3, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.

1 Dill. Mun. Corp., 39.

Among the declared objects for which the corporation of the city of New Orleans was created were to maintain the health and cleanliness of the city, and to provide for the extinguishment of fires.

City charter, act No. 20 of 1882, sec. 7.

A supply of water is essential and indispensable to accom-
464 plish these objects.

The limit to the exercise of this power must be that the regulations have reference to the comfort, safety, or welfare of society, and these rights of police regulation insured to municipal corporations by their charter may be from time to time subject to new regulations by the State with a view to the protection of the public safety, morals, and health, provided the corporation is not *depressed* by such new regulations of any of its essential rights and privileges.

Cooly Cons. Lim., 148, 718.

In the exercise of this right in their proprietary or private character, *or* distinguished from their public character, in their *infuribility* to the State on the part of the machinery of government, a municipal corporation do- so, not from considerations of state, but for the private advantage of the particular corporation as a distinct legal personality, and as to the exercise of such powers and property acquired thereby and contracts made in reference thereto they are to be considered as *quoad hoc* private corporations.

Dill. Mun. Corp., 66.

The city of New Orleans, by virtue of her inherent police powers, then, had a right to contract with reference to a water supply for the public health and to extinguish fires.

And, having the right and having made the contract, her responsibility is to be measured like that of any individual in any civil or business corporation.

The corporation of New Orleans is not, as urged in argument, the word of the courts. Her contracts cannot be annulled, except
465 for the same causes that the contract of agents and fiduciaries, and persons of full ages and capacitated may be declared void—that is, only when she exceeds her legal authority as trustee of the people or there is some fraud, either direct or by implication, in extravagant and corrupt administration, in which the beneficiaries in the contract were either actively or constructively parties or for some of the causes specified in Handy *vs.* N. O., 39 An., 107.

In making the contract now attacked did the city of New Orleans exceed any limitation placed upon her by the exercise of her police power? Her charter is silent as to any restriction. In it there is no regulation of any price as to the water to be supplied, nor is there any restriction as to the quantity or the character of the water. Act 56 of 1884 authorizes the city to contract for either clear or filtered water, and gives the city full discretion as to price, terms, and conditions. The only restriction which could operate upon the contract is not contained in sec. 15 of the charter of the water-works company, which prohibits it from fixing the price of water so that its net proceeds of the sale of water exceed this limit.

This court has said that "where a municipal corporation is authorized to impose a wharfage tax as a compensation for keeping the wharves in proper condition for the safe and expeditious ship-

ping and landing of merchandise a court will not undertake to fix a limit to the amount which the municipal authorities may exact for that purpose.

The question of the extent to which this right may be exercised is purely administrative."

Municipality *vs.* Pease, 2 An., 5, 38.

And in the instant case the city of New Orleans had full power to contract, without restraint as to the price, quantity, or
466 kind of water, and we are not disposed to question the administrative discretion vested in the city in this respect.

28 Ga. Rep., 50.

Wells *vs.* Atlanta, 43 Ga., 76.

Watson *vs.* Turnbull, 34 An., 856.

Pickles *vs.* Dry Dock Co., 38 An., 412.

We are of the opinion that, independent of any statutory provision subsequently enacted authorizing the city to contract for her water supply, *that* she had full and plenary power to do so under the provisions of her charter.

It is alleged, however, in plaintiffs' petition that the power of the city to make the contract flows from the provisions of act 56 of 1884, and for certain alleged vices in the act it is unconstitutional and void and conferred no authority on the city to make the contract. The unconstitutionality of the act is not to be implied. The court, if possible, will give the statute effect when it is clearly unconstitutional.

Nicholls, Gov., *vs.* Shakespeare, mayor, 41 An.

It is alleged that the act is unconstitutional and violates act 29, which says every law enacted by the General Assembly shall embrace but one object, and that be expressed in its title.

The act is entitled "An act to provide for the supply of water to the city of New Orleans by the New Orleans Water Works Co. in cases of the municipal taxation of said company; to authorize provisions to be made for the payment of water supplied and to be supplied; to provide for a clear or filtered supply of water by the New Orleans Water Works Co., and to enable the city of New Orleans to contract for the same and to regulate the payment
467 of taxes imposed on said company contrary to the exemptions given in its charter, and to put into effect sec. 11 of the act 33 of 1877, extra session, in instances of refusing as contrary to the exemption therein."

It is evident that the title of the act embraces but one object, the supply of water to the city of New Orleans, and authorizes the city to make provisions for the payment of the water, and indicates the object and purposes of the act. Every subdivision of the title relates to and is intimately associated with the object of the act. There is no other object expressed or intended in the title of the act than the main object of supplying the city with water and paying for it.

The sections of the act are directly responsive to the title and are germane and related to each other.

No section of the act contains any object different from the one object embraced in the title.

Edwards *vs.* Police Jury, 39 An., 855.

The act does not violate art. 57, because it does not grant an extra compensation to the water-works Co. There was no obligation on the company to supply the city with water at any price or any quantity. The city owed no service for which the compensation was granted; nor does the act conflict with art. 46, as the act does not in any way alter or amend the charter of the company. The act authorizes the city to contract and delegate the water-works Co. as the party with whom it may enter into the contract. There is no privilege granted to the company. It was not authorized to do any act which it could not already do by its charter; and as the
468 charter of the company was not amended, renewed, extended, or explained by the act it does not conflict with art. 234.

Act 56 affects the city of New Orleans in authorizing it to do a certain act, to make a contract with a corporation. The provision in art. 46 says that the article shall not apply to the city of New Orleans. To place the construction on the act contended for by plaintiffs would deprive every corporation of its vested rights with which the Legislature should authorize the city to the contract.

It is difficult to see in what manner the act is repugnant to art. 57, as there was no debt due by the water-works Co. to the city which was extinguished or released or which was authorized to be extinguished or released by said act.

City ordinance 909 is entitled "An ordinance to carry out the *sec.* No. 56 of 1884, providing for a future water supply from the New Orleans Water Works Co. to and for the city of New Orleans and certain institutions and regulating the use of water and the payment therefor."

The ordinance regulated the amount of the supply of water and fixed the price at $60 per annum for every fire-plug, fire-hydrant, and fire-well, to continue during the existence of the water-works Co.'s charter.

The contract made in pursuance of this ordinance makes it a part of the contract and is a substantial repetition of it.

Act 56 was provisional in its character and could not have affected except upon certain conditions which were under the control of the city. It was optional with the city to make a contract of the kind under the consideration with the water-works company. If
469 the city had the power to contract and execute a contract in pursuance of that power no individual tax-payers, if the city kept within the extent of her powers, can question the exercise of that power and set aside the action of the city council authorizing a contract within its legal discretion. There were no contractual relations between the city and the water-works company for supply-

ing the city with water for the purposes of extinguishing fires, cleansing the gutters, and supplying the public schools, markets, and public institutions. The city and the water-works company were free from obligations to each other and each had the capacity to contract for said purposes.

In making the contract to furnish the city with water with the water-works Co. all the requisites necessary to the validity of a contract were complied with: 1st, the legal capacity of the parties to make the contract; 2nd, their consent legally given; 3rd, a certain object which formed the matter of agreement, and, 4th, a lawful purpose.

R. C. C., 1779.

To set aside the contract, then, there must be error of fact or of law, fraud, violence, or threats.

R. C. C., 1819.

Not any one of these essentials to the illegality of the contract is found.

It is said by counsel for plaintiffs that "if we had nothing before us but the charter of the city and the charter of the water works with the 11th section out there would be some ground to defend a contract of this kind, but as long as that 11th section is in force (and it will be in force for fifty years) the Legislature has covered by positive enactment the whole subject of a public water
470 supply for this city, and the power of the city in reference thereto are necessarily in abeyance."

The effect of the judgment in the case of N. O. *vs.* W. W. Co., 36 An., 432, was to annul and eliminate said section from the charter. It was the section which provided for a supply of water to the city.

No other section provides for said supply of water, and the section expressly says that "it shall be the duty of said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter, and in consideration thereof the franchises and property of said New Orleans Water Works Company used in accordance with this act shall be exempt from taxation, state, municipal, and parochial." There was but one agreement to furnish water for every one consideration in the section, the exemption from taxation, and this by said decree in the case referred to was declared illegal and the whole section was annulled. There was not a partial failure of consideration, but a total and whole failure because of its illegality.

R. C., 2031.

City *vs.* Sugar Shed Co., 35 An., p. 551.

The city of New Orleans cannot repudiate the consideration which she was to pay and claim all the benefits in her favor.

As a general rule a judgment rendered by a court of competent jurisdiction directly upon a point at issue is a bar between the same parties. As we have previously stated, the only point at issue in this case of The City *vs.* W. W. Co., 36 An., was the exemption from

taxation of the property of the company, the legality of section 11 of the charter, and the amount to be restored to the company which it had paid on the annulled contract. Section 11 was the very section of the charter directly at issue.

471 "But there must be an identity of parties, of capacity, of object, and of cause of action. One of these is lacking here."

Collins *vs.* Jumel, auditor, 30 An., p. 863.

There is no question presented in this case of the exemption of the water-works Co. from taxation, nor is the amount allowed said company on its reconventional demand at issue. There is no fact at issue in the case of The City *or* Water Works Co., referred to, at issue in the instant suit. The matter at issue in the instant case is as to the authority of the city to make the contract now existing between the city and water company the constitutionality of act 56 of 1884 and its validity of the contract made in pursuance thereof. It is not doubted if act 56 is constitutional and the contract is within the legislative provision that it is a valid contract.

If the opinion in the case of New Orleans *vs.* Water Works Co., 36 An., 432, interpreted the legislative contract in the charter of the company with the city of New Orleans this certainly did not prevent the Legislature from authorizing the city to make another contract.

The new contract for a water supply differs in many respects from that which was sec. 11 of the company's charter.

The preamble to the act 56 authorizing the city to contract with the water-works Co. recites the reason for its enactment. The State in the exercise of her sovereignty had the undoubted right to act in the matters of the authorization of the city to contract for the purposes embodied in the act.

Nicholls, Gov., *vs.* Shakespeare, mayor, 41 A.

472 The Legislature having the power to ordain the city council to enact ordinance 909, the ordinance has the effect of an enactment of the Legislature. Roderick *vs.* Whitsea, 4 N. Y. S., 112. It is difficult to understand in what manner the decree in case of City *vs.* Water Works Co. could estop the Legislature from enacting such laws as it decreed necessary for the welfare of the city in authorizing her to make a contract.

The city, like a person having the power to do so, can alter, change, or abrogate her contracts with the consent of the other contracting party.

Therefore if the city and the water-works company's relations were established by said decree they could with legislative consent make another and a different contract.

The city was getting her water supply for the price of the amount of taxes owed her by the company. In the exercise of her prerogative she had the contract annulled. That in a new contract she has fixed a different price for her water is a matter which concerns her in the exercise of her administration functions. It was her own choice, her own act of administration, and we are not called upon to either command or condense this exercise of this discretion.

The city does not donate the price of the water as fixed in the contract to the water-works company. The city uses one-third of the active amount of the water pumped by the company. Edwards' report shows that the value of the water used by the city when she operated the water works amounted to $90,000. The pressure was then fifteen feet; now it is fifty feet; consequently there is a greater supply now than when the city owned the plant and
473 operated it, and the city pays now $24,000 less than the valuation at that time. It does not appear that the city pays more for her water supply than any other consumer. The fact is she pays less and gets her water at reduced rates.

To an impartial mind there can be no doubt but that the city has reaped great advantages from the operation of the water works by the present company. A large floating and bonded debt has been extinguished, aggregating one million five hundred and sixteen thousand dollars. The city is saved an annual deficit and owns shares in the company valued at over a quarter of a million of dollars, which it is probable will increase in value, from which she derives a revenue. She also receives a large and increasing amount from a tax on the property of the company.

These advantages resulting to the city from the charter granted to the company would appear to be sufficient for the exclusive privilege for a term of years for furnishing water to the inhabitants of the city.

The privileges to the company can scarcely be called a monopoly, because it is doubtful if the city could have allowed any company to undertake the responsibility of furnishing the city without at least a guarantee of some protection, not against competition, but against conveyances from irresponsible companies, whose existence would pass away on the payment of a price.

The water-works company undertakes to perform a function of municipal government, and the city, which owns shares in the company and otherwise interested pecuniarily, is represented on the board of directors. The water-works Co. is therefore a pub-
474 lic corporation, established and created by the State to do and perform a public work for the benefit of a political subdivision of the State; a monopoly created for public advantage.

We therefore are not impressed with the statement made by the counsel that the price paid by the city for her water supply is a disguised donation.

Had it been a semblance of such we would not hesitate — that it was corrupt and extravagant legislation on the part of the city council that authorized the mayor to make the contract, and as such is beyond the legitimate object and purpose of municipal government and within the rule expressed in Handy *vs.* City of New Orleans, referred to.

We conclude that act 56 of 1884 does not violate the constitution of the State, and that ordinance 909, passed by the city council in pursuance of said act, is a valid ordinance, and that the contract made between the city of New Orleans and the water-works Co. in pursuance of the power vested in said city by its present charter and

by said act 56 of 1884 and said ordinance dated 3rd day of Oct., 1884, and passed before J. D. Taylor, notary public, on said day is a legal and valid contract. It is therefore ordered and adjudged and decreed that the judgment affirmed from be avoided and reversed and annulled, and it is now ordered that plaintiffs' demand be rejected, the injunction issued herein dissolved and set aside, and the plaintiffs' tax-payers pay costs of both courts.

475 EDWARD CONERY, JR., *et als.*
vs.
NEW ORLEANS WATER WORKS CO. & CITY OF NEW ORLEANS. } 10334.

Concurring Opinion.

POCHE, *J.:*

Under my understanding of the pleadings the vital issues in this case involve the discussion of the legal effect of the judgment of this court in the case of New Orleans *vs.* Water Works Company, 36 An., 432, on the contract between the city and the company under date of Oct. 3, 1884, on ordinance No. 909, in obedience to which the contract was entered into, and on act No. 56 of the Legislature of 1884, on which the ordinance was predicated, and, finally, the alleged unconstitutionality of that act of the Legislature. The main contention on the first branch of the discussion is that the judgment in question was a bar by estoppel of *res adjudicata* to the execution of the contract between the city and the water-works company herein sought to be annulled and set aside, and incidentally to the operation of act No. 56, which is invoked as authority for the contract.

Without yielding but adding to the views expressed in my dissenting opinion in the case reported in the thirty-sixth of Annuals, p. 432, I fully recognize the effect of the judgment rendered by the majority of the court in that cause, and hence I do not propose, as duty enjoins me, to ignore or avoid its absolute authority.

476 From the pleadings in that case it appears that the action of the city was simply and exclusively to recover its taxes for the year 1881 from the water-works company without any reference to the contract contained in section 11 of act No. 33 of 1877, or to any contractual relations existing between the parties to the suit.

The prayer of the petition reads:

"Wherefore petitioner prays that the New Orleans Water Works Company, for account of its shareholders, be duly cited to answer this petition, and after due course of law that defendant be condemned to pay petitioner the sum of $11,484.87, with 10 per cent. per annum interest from March 31, 1881, till paid, with lien privilege and right of pledge on the property herein described, etc." For defense the company urged its exemption from municipal taxation under the provisions of act No. 33 of 1877, and in case it should be held liable for the taxes claimed it pleaded in reconvention

the value of the water furnished to the city during the year for which the taxes were sought to be enforced."

The prayer of the amended answer was in the following words:

"Wherefore this respondent, waiving no part of *their* original answer except as hereby amended, prays that it have judgment in its favor, declaring valid and enforcing said exemption from the taxes of the city of New Orleans of 1881 in this suit sought to be recovered, and rejecting plaintiffs' demand, and if this be refused, then that respondent have judgment condemning the city of New Orleans to pay unto it the sum of $40,281.87, with legal interest from Dec. 31, 1881," etc.

The judgment of the lower court was in favor of the city for $11,484.87, and in favor of the company for $40,281.87, and interest.

The decree of this court was as follows: "It is therefore
477 ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the principal of the amount allowed defendant on its reconventional demand from $40,281.87 to $11,484.87, and that as thus amended the same be now affirmed, defendant to pay costs of this appeal." As grounds for its decree the court held, in substance, that the exemption from taxation provided for in the act of 1877 was null, and "that to the extent that this subjection to taxation destroys or impairs the consideration upon which rests the contract of defendant to supply free water to the city defendant is entitled to relief, but to that extent only." From the consideration of these premises it must appear very clearly that the court in its decision was dealing with a well-defined and restricted issue, which it disposed of by interpreting the contested contract as it stood at the time, and that the court did not, as it could not, attempt to fix the contract for the future and for all time to come. Such a pretension would have involved the court into judicial legislation of the most reprehensible character.

While the judgment thus rendered could not have been pleaded technically as *res adjudicata* in a suit between the same parties for taxes of a subsequent year, met by the defence of exemption under the charter of the company, it is undeniable, under well-established jurisprudence, that the defence could have been successfully met by the plea of estoppel by *res adjudicata* predicated on the decision now under discussion, and that the result would have been a similar judgment allowing the city its taxes in the amount according to the assessment and the rate of taxes for that particular year, and allowing a judgment in reconvention and for the same amount to the defendant company.

Hence it follows that if the company was before the court
478 in this case seeking to enforce the provisions of the contract created by act No. 33 of 1877 it would be amenable to the same plea. But is that the case before us? By no means. From plaintiffs' own pleadings it appears that since the rendition of the judgment in question a new contract has been entered into between the city and the company, touching the supply of water by the latter to the city, and the very object of this action is to annul the con-

tract on the ground of its alleged illegality. Assimilating this suit to an action by the company for the enforcement of its contract, which is correct, plaintiffs contend that the previous judgment of this court is a bar by estoppel of *res adjudicata* to the right of the company "to recover a judgment for the full value of its water supply, irrespective of the amount of taxes," or, in other words, to seek judicial enforcement of the new contract executed in October, 1884.

At the incipiency of the litigation the city was in fact and in law a party defendant. Hence the suit did not embrace the same parties, either in fact or in the same character and capacity; but in the progress of the litigation the city shifted her position, and now she has practically made herself a party plaintiff, and it may be conceded that the parties are the same in the two suits; but the cause of action and the subject-matter are not the same.

In the previous suit the subject-matter of the litigation was the contract created for the parties by the act of 1877; in the present case the subject-matter is the contract made by the parties for themselves on the 3d of October, 1884, and which had been voluntarily executed by both from that day, at least up to the day that the city shifted her position. In the previous suit the cause of action on the part of the city was the enforcement of her taxes, and on the part of the company its alleged exemption from taxation
479 under the contract as then existing, or in the alternative the payment of the value of the water supplied to the city during the year for which the taxes were claimed. In the present case the cause for action on the part of the plaintiffs is the alleged nullity of the contract of Oct. 3, 1884, and the defence rests on its alleged validity and binding force, and in this case the question of taxation or exemption has entirely ceased to be a factor. If the suit in the case of the thirty-sixth annual had been between natural persons, involving the construction of an existing contract between them, and had resulted in a judgment annulling or materially modifying the contract, there certainly could have existed no legal impediment in the way of the same parties to have made a new contract on the same subject-matter. Now, if subsequent litigation had arisen between the same parties touching the construction or validity of the new contract executed by them, it is surely as clear that neither of them could have been met by a plea in bar of estoppel by *res adjudicata* to matters in the new contract not discussed or judicially determined in the previous litigation between the same parties. I have taken the pains to examine the authorities relied on in support of the application of the plea of estoppel by *res adjudicata* to the defence urged in the present case, but I have found not [none] which militate against the views I have hereinabove expressed. They all tend to establish the familiar principle that a question once judicially determined will estop the further agitation between the same parties of the same question, but they do not extend the rule to the point herein contended for by plaintiffs.

In our jurisprudence the rule has been formulated thus: "It matters not under what form, whether by petition, exception,
480 rule, or intervention the question being presented, whenever

the same question recurs between the same parties, even under a different form of procedure, the exception of *res adjudicata* estops."

Plicque *vs.* Peret, 19 La., 318; Sewell *vs.* Scott, 35 An., 553.

The main reliance seems to be in the case of Beloit *vs.* Morgan, 7 Wal., 621.

On that point the court said:

"On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities, though not the same with those in question in the case. The parties were identical and the title involved was the same. All objections taken in this case might have been taken in that. The judgment of the court would have been invoked upon each of them, and if it were adverse to the appellant he might have brought the decision here for review. The court had full jurisdiction over the parties and the subject. Under such circumstances the judgment is conclusive not only as to the *res* of the case but as to all other litigation between the same parties touching the same subject-matter, though the rest may be different." (Italics are mine.) It takes no effort to show that the present case entirely lacks one of the essential elements, the same subject-matter, which is necessary to support the plea.

The same remark applies to all the cases which I have examined, and particularly to those which are the most in point.

7 Wal., 82, Aurora *vs.* West; 39 An., 690, Adams *vs.* Board; 34 An., 815, Heroman *vs.* Institute (and eight Louisiana cases cited in the last decision).

No language used in the decision under discussion, either
481 in the decree or elsewhere, can justify the inference that under its effect the city was compelled to thereafter exact taxes from the water-works company, or, in other words, that she was thereby coerced to abide by the letter of that decision.

To ascertain the scope and legal effect of a judgment of the supreme court reference must be made to the decree whose terms must predominate as the safest guide. "The decretal part of a judgment rendered by the supreme court and not the opinion or the reasons afford the proper test to ascertain the matters which became *res adjudicata* under the decree." Succession of Hoggatt, 36 An., 327; Plicque *vs.* Peret, 19 La., 324.

It is conceded by plaintiffs that the city could have given her tax receipts to the company in exchange for the latter's receipts for water supply. Hence it follows that the city could have entered into a contract different in some terms from the previous contract as interpreted by this court. Hence I conclude that the judgment in that case was not an absolute bar to the contract now sued on; and the inference is fairly deducible from the whole contention that plaintiffs would not have complained if the contract which they resist had contained the terms fixing the price for the annual supply of water at some $21,000, which is the average of the annual taxes

paid by the company since 1884. I therefore feel convinced that the pith of the complaint is levelled at the extravagance of the contract more than at the power of the city to make the same.

But conceding, for the sake of argument, that the decision was a legal impediment to the city's action, without special legislative mandate, that authority is not lacking, because it flows directly from the provisions of act No. 56 of 1884.

482 It surely cannot be seriously urged that the Legislature is stripped of its power to authorize a contract to have effect in the future by judicial interpretation of a contract, and which at the time had reference to the present and to the past only. A very large proportion of the legislation in all the States is prompted by the decisions of courts, and is intended to remedy some mischief pointed out by or resulting from the utterances of the courts of the country.

Examples are, indeed, too numerous to warrant an enumeration of such instances. Now, in dealing with the subject in hand the Legislature must have been impressed with the thought that through her action the city had been instrumental in procuring a judicial declaration of the partial failure of the considerations of a contract made by the law-making power itself.

The city's demand for taxes was the first attempt made against the autonomy of the contract as framed by the General Assembly, and the judgment of the court operated the first breach into it. The judiciary power interposed then no objection to the right of the city to ask a change or a modification of the solemn contract emanating from legislative will, and the judiciary cannot now consistently abridge the unlimited power of the Legislature to provide a mode to mend the breach.

The law-maker had full warrant to consider that the contract which he had made for the parties came out of the hands of the court in a maimed and mutilated condition.

As a result of the judgment rendered the water-works company was held liable for taxes exigible as cash without the right
483 of compensating therefor the value of its water supplied for the uses of the city.

All it could obtain in satisfaction of its annual water supply was a judgment not executory and not collectible within any fixed or determined length of time.

Assuredly the judgment did not do absolutely even-handed justice. In the leading opinion, which was unanimous when rendered, it was said: "But for the nature of the city's claim being for taxes compensation would preserve the exact *status quo*."

"We regret that the city's financial condition prevents the judgment against her from being the immediate equivalent." On the application for rehearing the opinion of the majority contains the following significant language: "Contingencies of this kind were foreseen, but the principle was stamped in the act that however unequal, arithmetically, these two sums might be they should be equal in the contemplation of the statute, and that the one should be the exact equivalent of the other." * * * "It would

be perfect equity that the one should compensate the other, but the law interposes and declares a tax not compensable."

These considerations naturally had great weight on the legislative mind, and they doubtless prompted the enactment of act No. 56 of 1884, whose mission was to remove the legal interposition to the administration of absolute judgment and to restore "perfect equity" between the parties. A better and a purer motive of legislation could hardly be presented. Hence the object of the statute as expressed in its title was "to provide the supply of water to the city of New Orleans by the New Orleans Water Works Company in cases of the municipal taxation of said company; to authorize provision to be made
484 for the payment of water supplied and to be supplied; to provide for obtaining a supply of clear or filtered water by the New Orleans water works, and to enable the city of New Orleans to contract for the same; to regulate the payment of taxes imposed on said company contrary to the exemption given in its charter, and to put into effect section 11 of act No. 33 of acts of 1877, E. S., in instances of refusing or contrary to the exemption therein."

An examination of the provisions contained in the body of the act must satisfy the legal mind that they each and all tend directly and exclusively to the primary object as foreshadowed in the title of the statute, which is practically to restore the perfect equity between the parties which had been disturbed by the city's attack on the contract made by the Legislature for the parties in the act of 1887, and by the judgment of this court rendered in that case. The act does not purport to amend or modify the charter of the water-works company or to provide for or confer any advantage in the favor of the company. The latter's power to enter into a contract with the city of New Orleans or any other person for water supply is derived from its charter, and it did not need any enabling legislation to that end; but it was considered that the city was in need of legislative permission or authority to mend the breach which she had made, or procured to be made, in the original contract; hence the authority is therein given; but the mandate was not compulsory; it was simply optional and permissive.

Under its authority the city was at full liberty to return the original contract by ceasing to exact municipal taxes from the company or to do what is suggested by plaintiffs themselves, who say:

485 "All that the city had to do to make the equity perfect was to pass an ordinance directing the treasurer annually to receive the water bill of the water works in payment of its tax bill.

And she was also given the option, in case she chose to enforce payment of her taxes, to obtain her water supply by paying therefor in another mode.

In passing ordinance No. 909 the city elected to adopt the last-mentioned option, and the contract which she now seeks to rescind was the result.

The foregoing analysis of the object and provisions of act No. 56

is of itself an answer to all the objections urged against it on constitutional grounds.

As it is shown to embrace but one subject, it does not violate article 29 of the constitution, as charged by plaintiffs.

As it gives an option to the city of New Orleans to abide by the original contract for its water supply or otherwise to provide for the payment thereof, it is not in conflict with article 45, which forbids the General Assembly "to authorize any parish or municipal authority to grant any extra compensation for or allowance to any public officer, servant, or contractor." * * * (Italics are mine.)

Nor does it violate paragraph 13 of article 46, which prohibits the General Assembly from passing any local or special law * * * "creating corporations or amending, renewing, extending, or explaining the charter thereof." As already shown, the statute does not purport in the least to amend, renew, or explain the charter of the water-works company. Its only reference to the charter is to authorize, or almost to invite, the city to abide by the terms of its contract as therein stipulated. It must be considered as a local or special
486 law concerning a corporation, but, as New Orleans is that corporation, the prohibition does not apply under the terms of the proviso contained in the paragraph, which says: "Provided this shall not apply to the corporation of the city of New Orleans." * * * The only amendment ever made to the charter of the defendant company as such resulted from the judgment of this court, in so far as it modified the provisions of act No. 33 of 1877, section 11, which was the contract regulating the water supply to the city. In passing act No. 56 of 1884 the Legislature dealt with the charter as it found it then, altered from its original form, and its avowed object was to authorize the city at its option to do such acts as were necessary to restore the *status quo* of the parties disturbed as above set forth. The interpretation placed on the statutes by the parties to the contract which it authorizes is not the criterion of its constitutionality.

To test the constitutionality of a law by the mode in which the act is executed is surely a novel canon of construction which courts will be slow to adopt.

As the statute does not propose to release the defendant company "from any indebtedness, liability, or obligation * * * to this State, or to any parish or municipal corporation therein," it is not amenable to the charge of being violative of article 57 of the constitution. It, on the contrary, seeks to enforce the obligation of the company to supply the city with water, either for exemption from taxation or for adequate compensation otherwise provided for.

It is finally charged that the statute is violative of article 234, which reads:

"The General Assembly shall not remit the forfeiture of the charter of any corporation now existing, nor renew, alter, or
487 amend the same, nor pass any general or special law for the benefit of such corporation except on the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution."

As the statute contains no reference to the charter of the water-

works company coupled with the purpose of renewing, altering, or amending the same, it is very clear that the company is not in a condition to be affected by any of the terms of the article.

I therefore conclude that the statute under discussion is constitutional, just and proper, and that under its provisions the city had ample authority to enter into a contract with the defendant company for its water supply.

Having reached that conclusion, the court is powerless to control the city as to the details of the contract.

This proposition is fully sustained by the reasons and the authorities contained in the opinion prepared by Mr. Justice McEnery.

The price for water supply agreed upon may be excessive, but the contract is not attacked as fraudulent or inspired by corrupt motives, and it is not in fairness amenable to the charge of being a donation or to the charge of being over two millions of dollars for water for forty-three years in excess of what it should reasonably have been.

It is in proof that the average amount of taxes paid annually to the city by the company is $21,000, and that she receives an annual average as dividends for her stock in the company about $14,000, footing up her receipts from that source at $35,000 annually. Deducting that sum from the cost of water under the contract,
488 $68,340, it appears that the disbursements of the city for her water supply would be $33,340 each year—a sum much less than the value of a year's water supply as found by the district judge in the suit of the 36th Annual. It also appears that under the present contract the water supply of the city would cost annually more than $50,000 less than is shown by the records to have cost her when she owned and operated the works herself.

The contract is therefore not fraudulent or outrageously onerous and unreasonable, so as to warrant judicial interference with its continued existence or execution. I therefore concur in the decree herein made and to be rendered.

489 Supreme Court of Louisiana.

CLERK'S OFFICE, NEW ORLEANS, *May 22nd*, 1889.

ED. CONERY *et al.*
vs.
NEW ORLEANS WATER WORKS CO. *et al.* } No. 10334.

Mr. Chief Justice BERMUDEZ, dissenting:

This suit is brought by citizens and tax-payers for the avowed purpose of preventing an increase in the burden of taxation by an unauthorized and illegal disbursement of a fabulous sum of money by the city of New Orleans in favor of the water-works company.

They claim that in a controversy between those two corporations, in which each had a demand against the other, the city claiming taxes from the company and the company claiming the value of

water supplied to the city for the year 1881, this court interpreted the contract between them under act No. 33 of 1887, and declared that the company had no right to recover from the city in any year any sum for the water supply which it was bound to furnish greater than the amount of city taxes for that year, and they complain that in derogation of the judgment thus rendered an act, No. 56 of 1884, was passed by the Legislature, under which a contract was entered into by the city of New Orleans and the water-works company, the effect of which would be to have the city of New Orleans to pay to the company as the value of the water furnished an enormous amount over and above that which under the Legislature contract of 1887, as interpreted by this court, it would have otherwise to pay.

They charge that the act of the Legislature is unconstitutional, and that the contract under it is illegal and void, and that
490 in the absence of such act the city would be powerless to enter into such an agreement.

The defence set up naturally is the constitutionality of the act and the validity of the contract under it or without it.

The city of New Orleans is a party to these proceedings.

There is no plea of *res adjudicata* filed to operate as such in this suit. The plaintiffs and the city claim simply that the judgment in question could not be annulled and abandoned and disregarded so as to justify the act and contract attacked.

In the suit mentioned the city claimed taxes as due for the year 1881. The defense was that under the terms of its charter in consideration of its supplying the city with water all the property of the company which would otherwise be liable to taxation had been exempted formally from municipal taxation, the condition having been fulfilled; but that if the exemption was unconstitutional the contract was broken, lacked consideration, and became null, and that if the city has the right to demand her taxes the company is entitled to exact payment of the value of the water it furnished to the city.

After a consideration of the facts and of the law having a bearing on the controversy, the court, in a main and unanimous opinion, which remained undisturbed, notwithstanding an application for a rehearing, reached a conclusion for the reasons assigned that the city could recover her taxes and the company the value of the water supplied, provided it did not exceed the amount of the taxes.

It is not essential for the purpose of the present controversy to consider the language used in both opinions, as whatever it be it is binding on the parties only so far as it may conduce to the justification of the judgment rendered, and is not absolutely exclu-
491 sive of other determining motives tending in the same direction.

A review of the whole matter irresistibly impresses the mind that the judgment rendered is made to rest on the consideration—plausible, just, honest, and proper—that in the legislative intent the price or value of the water furnished was to fluctuate according to circumstances, but so as never to exceed the amount of the taxes

which might become due on the property of the company for any subsequent year whatever.

That judgment settled forever the question of the respective liability of both corporations, the one for the water supplied, the other for the taxes demandable. Its effect, as is that of all judgments, was to close the door for all time to those litigants on the subject of such reciprocal liability the one to the other.

The moment that judgment was rendered it became the property of each party, who then acquired the right of using it as an effectual shield for protection against any demand for more than it allowed to each party.

It was not a judgment intended merely to settle the question of amounts due for 1881 for taxes and water supply, but one designed to establish firmly for the future, during the term of the existence of the company, that in no case would it ever claim from the city for water supply any amount in excess of that which the city would have the right to demand for taxes due her.

The title of ownership which vested *to* that judgment in the two corporations was one which could not be divested unless by a mutual legal consent; but, as such consent was a legal impossibility, it follows that the judgment which was thus rendered has never ceased to have its binding force and effect, and that it is fatally destructive of both the act of 1884 and of the contract under it.

492 It is a recognized principle that, although parties may renounce the benefit of the authority of the thing adjudged, the courts have the prerogative, when such renunciation has taken place and after ascertaining that the judgment abandoned would be conclusive of the new litigation before them, to refuse to try the issue *de novo*.

Interest reipublicæ, ut sit finis litium.

It is perfectly true that the city of New Orleans is a State functionary, created by the sovereign, vested with necessary inherent and other expressly delegated rights, powers, and faculties; but it does not follow that on that account the sovereign can divest her of her property, appropriate it to its own use, or give it away, or impair the obligations of her contracts in her favor.

From that standpoint the Legislature was incompetent to deprive the city of her right of ownership to the judgment rendered in her favor, whereby she was to be relieved from all amount exceeding the taxes due her by the water-works company, and which she might have had to pay had not the judgment expounding the contract been rendered.

Surely, if the city could not with legislative sanction enter validly into the contract assailed, it was *ultra vires* for her to do so *proprio motu* under the circumstances of this case, for the plain reason that she was thereby abdicating arbitrarily advantageous privileges and rights belonging to the public, over which she had no control, replacing them by clearly ruinous and crushing obligations.

Those considerations suffice, in my opinion, to affirm the finding of the lower court refusing to apply or enforce the act attacked and avoiding the contract levelled against.

493 Supreme Court of Louisiana.

CLERK'S OFFICE, NEW ORLEANS, *May* 22*nd*, 1889.

EDWARD CONERY, Jr., *et al.*
vs.
NEW ORLEANS WATER WORKS CO. *et al* } No. 16334.

Mr. Justice FENNER, dissenting opinion:

This is a suit by tax-payers to procure the judicial annulment of a contract passed between the authorities of the city of New Orleans and the New Orleans Water Works Co., by which the city was obligated to pay $68,340.00 per annum for her water supply for public purposes during the period of 43 years from the date of the contract.

The grounds of nullity alleged are that the contract was fraudulent, *ultra vires*, and null as involving a practical donation in disguise to the company by payment to it of $68,340 per annum for a water supply which, under its charter contract, the company was legally bound to furnish for a sum not exceeding the annual taxes levied on it by the city. When this suit was brought the city, being then represented by the same authorities which passed the contract, joined the defendants, but, the *personnel* of the city administration having subsequently changed, the city now joins the plaintiffs in invoking a nullity of the contract.

The New Orleans Water Works Company was incorporated by an act of the General Assembly of the State, No. 33 of 1887, amended before acceptance by act 43 of 1878.

The charter conferred upon the corporation extensive priv-
494 ileges, including the exclusive privilege or monopoly of supplying the city of New Orleans and its inhabitants with water by means of pipes and conduits, for the term of fifty years from the passage of the act.

The 11th section of the charter (as amended) is as follows: "That the city of New Orleans shall be allowed to use water from the pipes and plugs of said company, now laid or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets, and charitable institutions, and that the said company shall place, free of any charge whatever, two hydrants of the most improved construction in front of each square where a main pipe shall be laid, at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets and cleansing the gutters, and for any other public purpose; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other, and the corners. It shall be the duty of said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter, and in consideration thereof the fran-

chises and property of said New Orleans Water Works Company used in accordance with this act shall be exempt from taxation, municipal and parochial."

The act was duly accepted by the city and by the water-works Co., and was executed without complaint or question for several years.

Under the State constitution of 1868, in force at the date of the charter, it was repeatedly held by this court that the legislative department could not validly exempt any property from taxation, either by commutation or in any other manner, unless the
495 property was "actually used for church, school, or charitable purposes."

28 Ann., 756; 31 Ann., 440, 827; 27 Ann., 376, 646, 648; 28 Ann., 498, 512; 31 Ann., 292, 637, 519.

Availing themselves of these adjudications, the city authorities then in power undertook, in 1881, to levy taxes on the property of the water-works Co. and brought suit to collect said taxes, amounting to the sum of $11,484.87. In that suit the water works answered, pleading the statutory exemption as a bar to the city's action, averring that the exemption was the sole consideration of its obligation to furnish free water to the city, and that, if the exemption was denied, it was entitled to recover from the city the value of the water supplied during the year, viz, the sum of $40,000.00, for which it prayed judgment in reconvention.

In the court of first instance there was judgment in favor of the city for the tax and in favor of the water-works company for the whole amount of its reconventional demand.

The case was then appealed to this —, and our decision therein is reported in 36 Ann., 432.

There was and could be no doubt as to the nullity of the legislative exemption from taxation. As to that, even the dissenting judge declared that there could be "but one opinion." It had, indeed, been placed beyond controversy under the doctrine of *stare decises.*

The fight was on the question of the effect of that nullity upon the obligation of the defendant to furnish free water.

To place beyond dispute the nature of the question involved and the sharpness and clearness with which it was presented it is well to quote from the opinions in the case. In the leading opinion
496 it is said: "The position of defendant is that the exemption from taxation was the sole consideration of defendant's obligation to furnish the city with free water, and that when the city elected to claim its taxes it released the defendant from its entire obligation to furnish free water and became bound to pay for all the water used, even though exceeding, as it does, threefold the taxes."

Another opinion was rendered on an application for a rehearing, in which it was said: "The argument resolves itself into the single proposition—*i. e.*, that the 11th section of the act distinctly and in terms declares the water supply to be the consideration of the exemption from taxation—which declaration the court can neither enlarge, restrict, nor otherwise alter, and the inevitable consequence

is that the exemption having become inoperative there can no longer be a free water supply of any quantity whatever." This was the proposition discussed and overruled. On the application for rehearing a dissenting opinion was read, in which it was said: "There is and can be but one opinion as to the nullity of the exemption from taxation; but the very reasoning which leads to that conclusion should, in my opinion, carry with it a declaration of the complete nullity of the contract, of which the tax exemption was one of the considerations, unless it can be made to appear that the act contemplates or provides for other and distinct considerations for the stipulated free supply of water." The learned judge, after further discussion, says: "The (11th) section must have been intended to and did beyond doubt create a complete and independent contract between the city and the company. The contract, as thus shaped and created, has reference to no other portion of the act, which is complete as an act without the contract contained in the section—
as complete as the contract itself stands without refer-
497 ence to any or to all of the provisions of the act. Hence follows, in my opinion, the irresistible conclusion that the consideration furnished by one of the parties having failed the entire contract must fall."

These quotations suffice to show the question directly involved in that case—that it was a necessary and the main question—and it was a question propounded by the water-works Co. itself as the basis of its reconventional demand.

Having thus exhibited the *rem decidendum*, let us next inquire what were the *res decisa*.

Abstaining from further quotations, a reference to the decisions themselves will show beyond doubt that the court held and decided as follows:

1st. That the exemption of the water works from taxation was unconstitutional.

2nd. That this exemption was not the sole consideration of the obligation to furnish free water, but that additional considerations existed in all valuable privileges conferred by the act.

3rd. That the failure of the stipulated exemption from taxation was therefore only a partial failure of the consideration for the water supply.

4th. That the extent of the failure of the consideration was exactly the amount of the taxes levied by the city.

5th. That the city would not be held to pay a greater amount for her water supply for the year than the amount of the taxes collected from the water works in that year.

6th. (On rehearing) That all the privileges granted by the charter, including the exemption from taxation, being considera-
tions on one side for the free water supply on the other, and
498 only a part of one consideration being withdrawn, equity required that only an exact equivalent should be withdrawn on the other.

Hence, while giving the city judgment for her taxes, we at the same time gave judgment in favor of the company against the city

for precisely the same amount in payment for water, saying "it would be perfect equity that the one judgment should compensate the other, but the law interposes and declares the taxes not compensable."

Every proposition above stated was necessarily involved in the issues between the parties, and the decision thereof could not have been reached without considering and determining them.

A construction of this decision, which confines attention to the particular claim and counter-claim then involved, ignores the construction of the contract then authoritatively made; is narrow and unwarranted, and under the plain terms of the decisions it is extraordinary that any one should claim that it annulled and wiped out the entire section 11, which was the very thing claimed by the Co. and expressly denied by the court.

It is impossible to formulate any expression of the doctrine of estoppel by *res adjudicata* sustained by any judicial or doctrinal authority which would not forever bar the city of New Orleans, the New Orleans Water Works Co., and their privies from questioning the conclusiveness of this decision and from ever again agitating the questions therein decided.

All systems of law and all judges and jurists are unanimous in the firm maintenance of this estoppel as essential to any reasonable or consistent administration of justice.

It was formulated in the digest of Justinian, where it is
499 written *res adjudicata pro veritate accipitur;* and again, *exceptionem rei judicatæ obstare quoties eadem quæstio inter easdem personas revocatur.*

It was imbeded in the common law of England and has been sacredly respected by this court as well as by the Supreme Courts of the United States and of the other States.

The estoppel of *res adjudicata* operates in two ways: 1st, if the second suit is based on the same cause of action, is between the same parties, and is for the same object or thing, then the first judgment is a conclusive bar to the whole suit; 2nd, but where the *res* or thing claimed is different, the cause of action and parties being the same, the first judgment is not a bar to the suit, but, none the less, it operates as a conclusive estoppel as to all questions of law and fact which were necessarily involved and determined in the former controversy.

From a mass of authorities sustaining the latter principle the following may be referred to:

Aurora City *vs.* West, 7 Wall., 96; Cromwell *vs.* County of Sac, 94 U. S., 353; Doty *vs.* Brown, 4 Comstock, 71; Outram *vs.* Morewood, 3 East., 346; Burt *vs.* Sternburg, 4 Cowen, 559; Couchard *vs.* Dias, 3 Denio, 243; Gardner *vs.* Buckbee, 3 Cowen, 120; Lumber Co. *vs.* Buchtel, 101 U. S., 638; Gould *vs.* R. R. Co., 91 U. S., 526; Beloit *vs.* Morgan, 7 Wall., 623; Merriam *vs.* Wittemore, 5 Gray, 317; Norton *vs.* Huxley, 13 Gray, 290; Burlen *vs.* Shannon, 99 Mass., 203; Tams *vs.* Lewis, 12 Penn. St., 402; Chamberlain *vs.* Gaillard, 26 Ala., 504; Perkins *vs.* Walker, 19 Vt., 141; Hayes *vs.* Gudykunst, 11 Penn St., 221; Peterson *vs.* Lathrop, 34 Penn. St., 223; Jackson *vs.* Lodge, 36

Cal., 28; Danaher *vs.* Prentiss, 22 Wis., 311; Barrs *vs.* Jackson,
500 1 Young and Col. C. C., 585; Caujolle *vs.* Ferrie, 13 Wall., 469.

The estoppel applies whether the issue was one of law or fact. Bouchard *vs.* Dias, 3 Denio, 243; Ferrer's Case, 6 Coke, 7*a*; Aurora City *vs.* West, 7 Wall., 84.

The rule of the civil law is the same. Thevenin *et al. vs.* Dufour *et al.*, Sirey 31, p. 41; Saint Leonard *et al. vs.* Bal, J. du P., 1843, vol. 2, p. 247; Gleize *vs.* Heritiers Gleize, J. du P., 1859, p. 514; Cass, 13 Fev., 1860 (Giudicelli), Sirey, v. 60, 1, 545; Cass, 26 aout, 1873 (Commune de Chaucevigney), Sirey, v. 74, 1, 294.

After discussing all the authorities the compilers of Smith's Leading Cases announce the rule as follows: "It results from the authorities that an adjudication by a competent court is conclusive not only in the proceedings in which it is announced, but in every other where the right or title is the same, although the cause of action (meaning, of course, the *res*) is different."

2 Smith's Lead. C., 943.

Lord Kenyon laid down the rules as follows: "If an action be brought and the merits of a question be discussed between the parties and a final judgment be obtained the parties are concluded and cannot canvass the same question again in another action, although, perhaps, some objection might have been urged upon the first trial which would have led to a different judgment."

Greathead *vs.* Bromley, 7 L. K., 456.

Mr. Bigelow makes the following statement of the rule: "A point once adjudicated by a court of competent jurisdiction may be relied on as an estoppel in any subsequent collateral suit in the same or any other court when either party or the privies of either allege anything inconsistent with it, and this, too, whether the subsequent suit be on the same or another cause of action."

501 Bigelow on Est., p. 45.

The foregoing was very recently quoted and approved by this court.

Adams *vs.* Board, 39 Ann., 693.

Mr. Wells, in his work on *Res Adjudicata*, after an exhaustive discussion of authorities, says: "By the overwhelm- weight of authority the rule is, that while the issue must be precisely the same, yet the object, subject, and causes of action do not require to be identical; so that if the precise issue of the former suit, necessary to the determination of the controversy therein, be again brought between the parties in the latter action, even though collaterally, yet relevantly and naturally, the former decision must conclude the matter from further dispute." Wells' *Res Ad.*, 304.

The Supreme Court of the United States sustains the same doctrine, saying: "The parties were identical, and the title involved was the same; the court had full jurisdiction over the parties and the subject. Under such circumstances a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between the

same parties touching the same subject-matter, though the *res* itself may — different."

Beloit *vs.* Morgan, 7 Wall., 622.

We upheld the same doctrine very emphatically in Heroman *vs.* Institute, 34 Ann., 815, saying: "The estoppel extends to every material allegation or statement which, having been made on one side — denied on the other, was at issue in the cause and determined therein."

Further quotations from authorities are needless, and those
502 made were perhaps superfluous.

They place it beyond dispute that the decision in the 36th Ann. case forever concluded and estopped the parties thereto from again agitating the question therein determined in any subsequent action. In any subsequent suit by the city for the taxes of succeeding years the water works would have been estopped to set up the exemption of its charter. In any subsequent suit by the water-works Co. — the value of water furnished it would have been estopped from claiming more than the amount of the taxes levied during the year in which the water was supplied, and the city would have been equally estopped to deny that she owed the value to the amount of such taxes.

Thus the legal status of the rights and obligations of the parties under the legislative contract embodied in the charter of the water-works company was definitely and irrevocably fixed. The city was irrefragably entitled to receive annually the supply of water stipulated in the act, and it was bound to pay therefor precisely the amount of taxes levied by it on the property of the company during the same year, and not a cent more could be claimed by the company.

A great part of the majority opinions is taken up with arguments to show that the plea of *res adjudicata* does not operate as a bar to the present suit. I do not understand any one to contend that it so operates. The principle of *res adjudicata* is invoked, not as a plea in bar in the present action, but as showing that the decision in 36 Ann. would have operated as *res adjudicata* in any subsequent suit between the parties touching the water supply and taxes for any subsequent year, arising under the 11th section of defendant's
503 charter, and that it therefore settled irrevocably the rights and obligations of the parties under the charter. This I understand to be conceded, at least in the opinion of Mr. Justice Poche; and this being so, the question is whether the radical change in those rights and obligations operated by the contract assailed is valid and within the powers confided to the officers of the city government.

Let us now turn to the contract assailed in the instant suit:

In September, 1884, a contract was entered into between the mayor of the city (acting in virtue of an ordinance passed by the city council) and the New Orleans Water Works Co., whereby as a consideration for the water supply therein stipulated the city "engages and contracts to pay unto said company annually the sum of sixty

dollars for each fire-plug, fire-hydrant, and fire-well, of which there are now 1,139, and which number shall ever be the least measure of the annual sum to be paid to said company, and to pay to said company annually sixty dollars for every additional hydrant, fire-well or fire-plug exceeding said sum of 1,139 and hereafter attached to said mains or pipes."

Thus it appears that the city bound itself to pay for its water supply the least sum of $68,340 annually during the whole remaining term of the company's charter, or for about 43 years.

It appears that the taxes paid by the company to the city were, in 1885, $20,619.37; in 1886, $22,093.59; in 1887, $20,113.60; in 1888, $21,405.78. Under the charter of the company, as interpreted by this court, these sums fixed the limits of the city's liability for the water supply for the respective years which the company
504 was bound to furnish under its charter. Nothing indicates that the taxes will ever be greater unless it results from the extension of the water works caused by the growth and expansion of the city, in which case the amount to be paid by the city for the necessary additional plugs and hydrants would correspondingly increase.

Thus we find that while the city was legally entitled to have her water — additional consideration for the immensly increased price. Indeed, the preamble of the ordinance conclusively shows that none such was contemplated or operated as an inducement to the contract.

The preamble is as follows:

"Whereas the city of New Orleans has been and is and will be unable to allow the New Orleans Water Works Company the fifty years' exemption from taxation, being the consideration for a free supply of water contemplated by section II of act No. 33 of the acts of 1877, and the courts having decided that the exemption from municipal taxation granted in said act is not and shall not be enjoyed, and therefore, as is also decided, that the city must pay for the water supplied by said company; and

"Whereas it is best to arrange for a fixed annual price for said water supply rather than leave the city liable to an annual demand, the amount — which cannot be known in advance and from which the city cannot be relieved, but is specially authorized and required to provide for the payment therefor; and

"Whereas the said New Orleans Water Works Company is willing to accept terms arranging for a sum to be determined in advance of each year, and which amount can be readily and equitably
505 fixed, according to a mode adopted in other cities, by reference to the number of fire-hydrants, fire-plugs, or fire-wells, now numbering eleven hundred and thirty-nine (1139), in this city: Therefore," &c.

In the teeth of the decision of this court the ordinance rests exclusively on the false recital that the city was bound to pay the full value of the water supply regardless of the amount of taxes, and the change in the terms of the prior contract is declared to be

simply for the purpose of establishing a better mode of fixing the compensation.

The pretense that this ordinance was intended as authorizing a new contract fixing an honest additional price for a fair additional consideration has no foundation, either in its terms or in the evidence in this case.

By the effect of this contract the water works company furnishes substantially the same supply of water which it was bound to furnish under the terms of its charter; it enjoys a perfect practical exemption from taxation, because the city is bound to furnish it in advance with the money to pay the taxes, and, in addition, the company receives a contribution of about $2,000,000, payable in annual instaliments of over $40,000 for forty-three years.

If this is not a disguised donation what shall it be called, unless we choose to term it an undisguised donation, for, indeed, the garniture of contract in which it is clothed is too flimsy and transparent to serve as a disguise.

It is vain to point — the provisions of the city charter authorizing the city council to provide itself and its inhabitants with pure and wholesome water and to make contracts for such purpose.
506 No one would be bold enough to contend that those powers cover donations of the money exacted from the tax-payers.

Equally vain is it to appeal to the discretion vested in the political authorities of the city to judge as to the advisability of contracts and the reasonableness of considerations.

A donation placed in the form of a contract cannot find protection under any degree of respect due to such pretended discretion. But it is said that this contract is a compromise of the conflicting rights claimed respectively by the city and the company. It is not, and it does not pretend to be, a compromise. There were no conflicting rights. The rights of the parties had been finally settled by the decree of this court, which had not even been appealed from, and which nothing shows the company intended or threatened to appeal from. The appeal taken since the institution of this suit is too late to affect the status of the case.

The last appeal of the company is to act 56 of the General Assembly of 1884, passed after the decision rendered by this court.

That act is ambiguous in its terms, and it is needless to discuss its provisions and its phrascology.

It either authorized this contract or it did not. If it did not, there is an end of its pertinency.

If it did, it clearly violates the following articles of the constitution, viz., art. 45, which declares: "The General Assembly shall have no power to grant or authorize any parish or municipal authority to grant any extra compensation, fee, or allowance to a public officer, agent, servant, or contractor," and art 57, which declares that "the General Assembly shall have no power to release or extinguish or to authorize the releasing or extinguishing,
507 in whole or in part, the indebtedness or liability of any corporation or individual to this State or to any parish or municipal corporation thereof."

The applicability of these two articles is too patent to need comment.

If, under its charter, as interpreted by this court, the water-works company was bound to furnish the water annually for a compensation not exceeding the amount of its taxes, how could the Legislature authorize the city to pay to such contractor an extra compensation of $45,000 per annum? And if such was the "liability" of the water-works Co., how could it be released and extinguished by substituting therefor a different and vastly less onerous liability?

Moreover, if the act has this effect it is clearly an amendment of the charter of the company, because it changes the whole effect and operation of section 11 thereof, as interpreted by this court. This is a local and a special law, and the Constitution, article 46, declares: "The General Assembly shall not pass any local or special law creating corporations or amending, renewing, extending, or explaining the charter thereof."

If an act of the Legislature which has the effect of changing and radically diminishing the obligations imposed upon a corporation by its charter is not practically an amendment or alteration of the charter, what would be such an amendment?

Finally, art. 234 of the constitution declares: "The General Assembly shall not remit the forfeiture of the charter of any corporation now existing, or renew, alter, or amend the same, nor pass any law for the benefit of said corporation, except on the condition that said corporation shall thereafter hold its charter subject to
508 the provisions of this constitution."

The provisions last referred to are those which aim at monopolies and subject the rights of corporations absolutely to the police power of the State, to be controlled thereby whenever deemed to infringe the "general well-being of the State."

The water-works company has never accepted this act, but has declined to accept it. It has contrived to obtain a most important and radical amendment and alterations of its charter rights and obligations without subjecting itself to these provisions and without imperilling its monopoly.

Having never had the slightest ground of complaint except the loss of its exemption from city taxation, it has secured an indemnity for this loss, which converts it into an enormous gain, because the city not only pays to it in advance the money with which to pay its taxes, but adds an annual gift of $45,000 per annum in addition.

Exemption from taxation has no sentimental value—no *pretium affectionis* or *honoris*. It is a simple relief from the obligation to pay a certain amount of money. If the city had made provision to take the water bill in discharge of its taxes or if it had appropriated and paid to this Co. the amount of taxes with which to pay them, the charter right of the company would have stood *totus, teres atque rotundus* without a shadow of infringement.

I have looked at this case from every point of view and confess my inability to discover any consideration of justice, equity, or law to support this extraordinary contract.

I therefore dissent.

509 *Judgment and Decree.*

Extracts from the Minutes of May 22nd, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Samuel D. McEnery, associate justices.

Absent: His honor Lynn B. Watkins, associate justice.

E. CONERY, Jr., *et al.*
vs.
NEW ORLEANS WATER WORKS CO. *et al.* } No. 10334.

It is ordered and adjudged and decreed that the judgment appealed from be avoided and reversed and annulled; and it is now ordered that plaintiffs' demand be rejected, the injunction issued herein dissolved and set aside, and the pl'ffs, tax-payers, pay costs of both courts.

Mr. Justice Poche read a concurring opinion. Mr. Chief Justice Bermudez and Mr. Associate Justice Fenner read dissenting opinions.

Petition for Rehearing. Filed May 29th, 1889.

EDWARD CONERY, Jr., *et als.*
vs.
NEW ORLEANS WATER WORKS CO. *et als.* } No. 10334.

510 To the honorable the judges of the supreme court of the State of Louisiana:

Edward Conery, Jr., *et als.*, plaintiffs in this cause, respectfully pray your honors to grant them a rehearing herein upon the following grounds, to wit:

First. That the court ought not at this time to have decided this cause, while a writ of error was pending in the Supreme Court of the United States from the decision of this honorable court in the case of The City of New Orleans *vs.* The New Orleans Water Works Co., reported in 36th An., the judgment in which case lies to a large extent at the basis of the rights of the parties herein, and the writ of error pending in the Supreme Court of the United States being distinctly based upon the grounds upon which this court decided the 26th Annual case, which ground the majority of the court in this case now denies the existence of.

Second. Because the court erred in its statement of the facts of this case, and especially in its statement of the issues involved in the 36th Annual case.

Third. Because the court erred in failing to give full, true, and perfect effect to the estoppel of *res adjudicata* growing out of the said 36th Annual case.

Fourth. Because the court erred in depriving by its judgment the

city of New Orleans of its property rights in the decree of this court on the issues involved in the said 36th Annual case.

Fifth. Because the interpretation placed by the court on act 56 of the acts of 1884 amounts to an impairment of the obligation of the contract involved in the charter of the New Orleans Water Works Company between the city of New Orleans and the water-works company, contrary to section 10 of article 1 of the Constitution of the United States, the rights of the city in respect to said charter being private rights and not public rights under the control
511 of the legislative department of the Government.

Sixth. Because the decision of the court deprives the city of New Orleans of her property in the said judgment rendered by this court in the case of The City of New Orleans *vs.* The New Orleans Water Works Company, reported in 36th annual, without due process of law, contrary to the fourteenth amendment to the Constitution of the United States.

Seventh. Because there is error of law and fact in the interpretation placed by the court upon act 56 of the acts of 1884, and error of law and fact in deciding that the said act had any constitutional validity whatever.

Eight. Because there is error in the opinion of the court in finding that the contract made under ordinance 909 was lawful and valid, and that said contract was a reasonable exercise of the powers granted to the council of the city of New Orleans by law.

Ninth. Because there is error in the opinion of the court relative to the effects of the said contract upon the property rights of the city of New Orleans and the interests of its tax-payers.

Wherefore petitioner prays that this application may be granted; that a rehearing may be ordered herein; that the judgment of this court may in said rehearing be reversed and the judgment of the district court be affirmed.

(Signed) EDGAR H. FARRAR, *Att'y.*

512 (Copy.)

Motion and Order for Time to File Briefs on Rehearing. Filed May 29th, 1889.

E. CONERY, Jr., *et al.*
vs.
NEW ORLEANS WATER WORKS CO. } No. 10334.

On motion of Edgar H. Farrar, of counsel for the plaintiffs, and on suggesting to the court the application for a rehearing herein filed and the grave public issues involved in this cause and the grave difference of opinion between the judges of the court relative to the rights of the plaintiffs and the city of New Orleans herein—

It is ordered by the court that time be granted the said plaintiffs until the first Monday in November, 1889, to prepare a brief for a rehearing in this cause.

Motion and Order for Time to File Briefs on Rehearing.

Extract from the Minutes of May 30th, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

EDWARD CONERY, JR., *et al.*
vs.
NEW ORLEANS WATER WORKS CO. *et al.* } No. 10334.

513 On motion of Edgar Farrar, Esq., for extension of time to file briefs in support of the application for rehearing, on file in this case, the court ordered that plaintiffs be allowed until the first of September next, 1889.

Rehearing Refused.

Extract from the Minutes of November 18th, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

EDWARD CONERY, JR., *et al.*
vs.
NEW ORLEANS WATER WORKS CO. *et al.* } No. 10334.

Rehearing refused.

514 *Petition for Writ of Error. Filed November 18th*, 1888.

EDWARD CONERY, JR., *et als.*
vs.
NEW ORLEANS WATER WORKS COMPANY *et als.* } No. 10334.

To the honorable the chief justice of the supreme court of the State of Louisiana:

The petition of The City of New Orleans, plaintiff, in the cause above named and numbered, through the mayor, and of Joseph A. Shakespeare, mayor of said city, with respect represents—

That there is error to the prejudice *to* the city of New Orleans in the judgment rendered in the above-entitled suit by the supreme court of the State of Louisiana on the 22nd day of May, 1889, and which became final November 18th, 1889, and petitioners desire to appeal therefrom; that petitioners, The City of New Orleans, set up in the amended and supplemental answer filed by petitioner the

right of the city to a supply of water from the New Orleans Water Works Company free of charge, under and by virtue of the terms of act No. 33 of the session of 1877, of the Legislature of Louisiana; that section 11 of said act rightfully constitutes and has the force and effect of a contract entered into between the State of Louisiana and the New Orleans Water Works Company, whereby the city of New Orleans was to be supplied with water free, in consequence of
515 the franchise with its numerous advantages secured unto said company; that said contract has received judicial interpretation and sanction and is legal, valid, and binding as finally determined by this honorable court in the case of The City of New Orleans *vs.* The New Orleans Water Works Company, No. 9007 of the docket of said court, and reported in the 26th Louisiana Annual Reports, p. 432, *et seq.*

That the city of New Orleans, in its said amended and supplemental answer, set forth said act No. 33 of 1877, E. S. of the General Assembly of Louisiana, as constituting a contract between said defendant and the State of Louisiana, wherein petitioner was the real party in interest and to be benefited by the terms thereof, and providing for a free supply of water to petitioner by the defendant company, and that act No. 56 of the session of the General Assembly of Louisiana of 1884 and ordinance No. 909, council series, passed by the common council of the city of New Orleans on the 23rd day of September, A. D. 1884, and the contract entered into thereunder between the mayor of the city of New Orleans and the said New Orleans Water Works Company before Joseph D. Taylor, notary public, on October 3rd, 1884, diminish and impair the obligation of said contract under act No. 33 of 1877, and thereby violates article 1, section 10, of the Constitution of the United States; and your petitioner specially pleaded said section in defence of and to protect its rights in the premises and invoked the benefit of the same and asked that ordinance No. 909, C. S., and the contract made thereunder of date September 23rd, 1884, be declared illegal, null, and void. No money judgment was asked for by petitioner.

That the said decision of the supreme court of Louisiana, adjudicating upon and determining the rights of the respective parties in the suit entitled City of New Orleans *vs.* The New Orleans Water Works Company, No. 9007 on the docket of said court, belongs to and is the property of the city of New Orleans, of which it
516 cannot be divested without due process of law, and that act No. 56 of the General Assembly of Louisiana of 1884, ordinance No. 909, C. S., and the contract made thereunder, all hereinbefore referred to, operate as a divestiture of petitioner's property, all in violation of article 5 of the amendments to the Constitution of the United States, which said article is now pleaded by the petitioner.

That the supreme court of Louisiana in its said decree avoided, annulled, and set aside the contract contained in act No. 33 of 1877, extra session of the General Assembly of the State of Louisiana, and declared valid and legal and binding said act No. 56 of the General Assembly of 1884, ordinance No. 909, C. S., and the con-

tract entered into thereunder on October 3rd, 1884, between the city of New Orleans and the New Orleans Water Works Company.

The petitioner sets forth that act No. 33 of 1877, E. S., contained the terms upon which it was to obtain water from the defendant company to the exclusion of all other acts and ordinances as defined by the supreme court of Louisiana in the judgment rendered in the case of The City of New Orleans *vs.* The New Orleans Water Works Company, and that the subsequent judgment of the supreme court in this case destroyed the contract as contained in act No. 33 of 1877 and the rights and property of the city of New Orleans as settled in the first judgment of the court, No. 9007, referred to, and that said second judgment as rendered herein is against the right and title set up by the city of New Orleans against the protection alleged and claimed under and by virtue of section 10 of article 1 of the Constitution of the United States, and is contrary to and violative of said section 10, article 1, and impairs the obligations of the contract hereinbefore alleged and of right obtaining between petitioner and the said New Orleans Water Works Company.

517 That said New Orleans Water Works Company claims, under and by virtue of act No. 56 of 1884, ordinance No. 909, C. S., and the pretended contract entered into by it and the city of New Orleans, a sum exceeding $68,000.00 per annum from the city of New Orleans throughout a term exceeding forty years, all of which is contrary to and in violation of the contract contained in act 33 of 1877, E. S., the law of the land, and the Constitution of the United States; and the said supreme court in its decree maintained said act No. 56 of 1884, ordinance 909, and the contract made thereunder, and denied the binding force and effect of the contract contained in act No. 33 of 1877, E. S., and by its said decree deprives petitioner of its rights and to the judgment rendered in the cause of The City of New Orleans *vs.* The New Orleans Water Works Company, No. 9007 on the docket of this court, and reported in 36 Annual Reports, p. 423, *et seq.*

Wherefore petitioner prays to be allowed a writ of error to the Supreme Court of the United States to revise said judgment and decree of the supreme court of Louisiana, returnable to the Supreme Court of the United States at its next term, to wit, on the second Monday of October, 1890, and that said writ operate as a supersedeas on petitioner and plaintiff in error giving bond in a sum to be fixed herein, and petitioner prays that Edward Conery, Jr., *et als.* and the New Orleans Water Works Company be cited to answer said writ in said Supreme Court of the United States on the day and date aforesaid; that the judgment appealed from be reversed and set aside, and that there be judgment for petitioner as prayed for, and for general relief.

(Signed) JOS. A. SHAKESPEARE,
Mayor City of New Orleans.

518 (Signed) CARLETON HUNT,
City Attorney.
W. B. SUMMERVILLE,
Ass't City Att'y.

Order Granting Writ of Error.

As prayed for, the writ allowed on bond of five hundred dollars. New Orleans, November 18th, 1889.

(Signed) E. BERMUDEZ,
Chief Justice of the Supreme Court of the State of Louisiana.

Copy of Writ Lodged in Clerk's Office.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Louisiana, before you or some of you, being the highest court of law or equity of the said State in which a decision
519 could be had in the said suit between Edward Conery, Jr., James B. Sinnot, Philip Hirsch, Geo. E. Sears, Frederick J. Odendahl, Wm. Dillon, Wm. H. Renaud, Booth F. Glover, John B. Camors, Alfred F Baker, Joseph Simon, Nicholas Burke, Henry F. Cottam, Philip Thompson, Andrew Hero, Jr., Alfred Moulton, Louis Bush, James A. Chalaron, George H. Dunbar, E. J. Kursheedt, John W. Labouisse, Henry Lochte, I. L. Lyons, Ambrose A. Maginnis, Edward Miltenberger, Charles J. Meyer, Thomas N. McEnery, John Phelps, Joseph Schwarty, John Simpson, Edward Thompson, Samuel A. Trufant, Gideon Townshend, Anthony Vizard, N. D. Wallace, George Q. Witney, Pearl Wight, Alfred A. Woods, Octave F. Vallette, Newton Buckner, Daniel A. Calder, James G. Clarke, and Michael A. Rogers and The City of New Orleans against The New Orleans Water Works Company, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said city of New Orleans and Jo-
520 seph A. Shakespeare, mayor of said city, as by this complaint appears, we, being willing that error, *in* any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together

with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 18th day of November, in the year of our Lord one thousand eight hundred and eighty-nine.

(Signed) E. R. HUNT,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by—
(Signed) E. BERMUDEZ,
Chief Justice Supreme Court of the State of Louisiana.

Copy of Bond for Writ of Error.

Know all men by these presents that we, Joseph A. Shakespeare, mayor of the city of New Orleans, a municipal corporation under the laws of the State of Louisiana, as principal, and W. H.
521 Bofinger, Jr., *et als.*, — in the full and just sum of five hundred dollars, to be paid to the said New Orleans Water Works Company and Edward Conery, Jr., *et als.*, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighteenth day of November, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the supreme court of the State — Louisiana, holding sessions in the State of Louisiana at the city of New Orleans, in a suit depending in said supreme court wherein The City of New Orleans is plaintiff and The New Orleans Water Works Company is defendant, judgment was rendered against The City of New Orleans, plaintiff, and the said Joseph A. Shakespeare having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation, directed to the said New Orleans Water Works Company and E. Connery, Jr., *et als.*, citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Joseph A. Shakespeare, mayor of the city of New Orleans, shall prosecute his writ to effect and answer all damages and cost if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOS. A. SHAKESPEARE, *Mayor.* [L. S.]
(Signed) W. H. BOFINGER. [L. S.]

Sealed and delivered in the presence of—
(Signed) LAURENT M. MARTIN.

522 *Clerk's Certificate.*

STATE OF LOUISIANA, *Parish of Orleans,* } ss:

I, Joseph F. Poche, clerk of the supreme court of the State of Louisiana, holding sessions in the city of New Orleans, do hereby certify that the foregoing five hundred and twenty-one pages contain a full, true, and complete copy of the transcript of the record and proceedings had in the civil district court for the parish of Orleans in a certain cause wherein E. Conery, Jr., and others were plaintiffs and The City of New Orleans, Isaac Patton, John H. Hardy, and The New Orleans Water Works Company were defendants, brought to this court by appeal by the New Orleans Water Works Company, and also a complete, true, and correct copy of the record of all proceedings had in and concerning said cause and appeal in this court as now remain of record in this court.

In testimony whereof I have hereunto set my hand and affixed the seal of this honorable court, at the city of New Orleans, this fourth day of December, A. D. one thousand eight hundred and eighty-nine, and in the one hundred and fourteenth year of the Independence of the U. S.

Seal Supreme Court of the State of Louisiana.

JOSEPH F. POCHÉ, *Clerk.*

Chief Justice's Certificate.

I, Edward Bermudez, chief justice of the supreme court of the State of Louisiana, do hereby certify that Joseph F. Poche is clerk of supreme court of the State of Louisiana, and that the signature of Joseph F. Poche to the above certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all his official acts as such.

523 In testimony whereof I have hereunto set my hand and seal, at the city of New Orleans, this fourth day of December, anno Domini 1889, and in the 114th year of the Independence of the United States of America.

Seal Supreme Court of the State of Louisiana.

E. BERMUDEZ, *Chief Justice.*

524 Supreme Court of the State of Louisiana.

E. CONERY, Jr., *et al.* *vs.* THE NEW ORLEANS WATER WORKS COMPANY *et al.* } No. 10334.

The New Orleans Water Works Company, defendant in the writ of error to the Supreme Court of the United States allowed in this

cause, admits the issuance of citation in error in this cause, waives all errors in form or substance in such citation, if any, and admits that the citation in error has been served in due form on the New Orleans Water Works Company, and will enter the appearance of the said company in the Supreme Court of the United States without any exception as to citation or service of either writ of error or citation on said defendant.

J. R. BECKWITH,
Counsel for The New Orleans Water Works Company, Def't in Error.

525 [Endorsed:] No. 10334. Supreme court of La. E. Conery, Jr., *et als. vs.* N. O. Water Works Co. *et al.* Waiver of citation. Supreme court of Louisiana. Filed Dec. 12th, 1889. Joseph F. Poché, clerk.

Endorsed on cover: Louisiana supreme court. No. 1525. The City of New Orleans and Joseph A. Shakespeare, mayor of said city, plaintiff in error, *vs.* The New Orleans Water Works Company *et al.* Filed December 20, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1536.

EDWARD CONERY, JR., ET AL., PLAINTIFFS IN ERROR,

vs.

THE NEW ORLEANS WATER WORKS COMPANY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Extracts from the Transcript of the Record.

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Copy of Bond for Writ of Error.

Know all men by these presents that we, Edward Conery, Jr., and others, plaintiffs in this cause, as named in detail in the petition and in the writ of error herein, as principals, and Edgar Howard Farrar, as surety, are held and firmly bound to The New Orleans Water Works Company and The City of New Orleans in the full and just sum of one thousand dollars, to be paid to the said —— ——, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, in the supreme court of Louisiana, holding sessions in the city of New Orleans, in a suit depending in said circuit court, wherein Edward Conery, Jr., *et al.*, are plaintiffs and The City of New Orleans *et als.* are defendants, judgment was rendered against Edward Conery, Jr., *et als.*, plaintiffs; and the said Edward Conery, Jr., *et al.*, having obtained a writ of error and having filed a copy thereof in the clerk's office of the said supreme court of Louisiana, reverse the judgment in the aforesaid suit, and citations directed to the said defendants, citing and admonishing them to be and appear

at the Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such that if the said Edward Conery, Jr., *et al.*, shall prosecute their writ to effect and answer all damages and cost, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) EDWARD CONERY, JR., ET AL. [L. S.]
Pp. E. H. FARRAR, [L. S.]
Their Att'y of Record.
EDGAR HOWARD FARRAR. [L. S.]

Sealed and delivered in presence of—
—— ——.

Approved by—
(Signed) E. BERMUDEZ,
Chief Justice S. C., La.

UNITED STATES OF AMERICA, }
Eastern District of Louisiana, } *ss:*

Personally appeared Edgar Howard Farrar, who, being duly sworn, deposes and says that he is the surity on the within bond; that he resides in the city of New Orleans and State of Louisiana, and is worth the full sum of one thousand dollars, over and above all his debts and liabilities and property exempt from execution.

(Signed) EDGAR HOWARD FARRAR.

Subscribed and sworn before me this 14 day of December, 1889.
(Signed) E. R. HUNT,
Commissioner U. S. Court, Eastern District of Louisiana.

Approved—
(Signed) E. BERMUDEZ,
Chief Justice S. C., La.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Louisiana, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Edward Conery, Jr., James B. Sinnott, Philip Hirsch, Geo. E. Sears, Frederick J. Odendahl, William Dillon, William H. Reynaud, Booth T. Glover, John B. Camors, Alfred T. Baker, Joseph Simon, Nicholas Burke, Henry T. Cottam, Philip Thompson, Andrew Hero, Jr., Alfred Moulton, Louis Bush, James A. Chaleron, George H. Dunbar, E. I. Kursheedt, John W. Labouisse, Henry Lochte, I. L. Lyons, Ambrose A. Maginnis, Edward Miltenberger, Cassius J. Meyer, Thomas N. McEnany, John Phelps, Joseph Schwartz, John F. Simpson, Edward Thompson,

Sam'l A. Trufant, Gideon Townsend, Anthony Vizard, N. D. Wallace, George Q. Whitney, Pearl Wight, Alfred A. Woods, Octave T. Valette, Newton Buckner, Daniel A. Calder, James G. Clark, Michael A. Rogers, as plaintiffs, and The City of New Orleans, I. W. Patton, treasurer, & J. N. Hardy, controller, and The New Orleans Water Works Company, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said Edward Conery, Jr., and other plaintiffs hereinabove named and set forth, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 14th day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

[SEAL.] E. R. HUNT,
Clerk of the Circuit Court of the United States
for the Eastern District of Louisiana.

Allowed by—
E. BERMUDEZ,
Chief Justice of the Supreme Court
of the State of Louisiana.

Service of the within writ accepted and citation waived for the City of New Orleans, I. W. Patton, city treasurer, and J. N. Hardy, comptroller.

CARLETON HUNT,
City Att'y.
W. B. SOMMERVILLE,
Ass't City Att'y.

N. O., Dec. 16th, 1889.

Service of this writ acknowledged and citation waived by the New Orleans Water Works Company, defendant in error. Said company will enter its appearance in the Supreme Court of the United States and this endorsement shall stand as full appearance in said Court.

Dec. 16, 1889.

J. R. BECKWITH,
Counsel for New Orleans Water Works Co.

(Endorsed:) No. 10334. Supreme court of La. Edward Conery, Jr., *et al. versus* The City of New Orleans *et al.* Writ of error. Supreme court of Louisiana. Filed Dec. 14th, 1889. Joseph F. Poché.

* * * * * * *

Office Supreme Court, U. S.
FILED,
OCT 29 1891
JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

No. ~~1525~~ 632

THE CITY OF NEW ORLEANS AND JOSEPH A. SHAKESPEARE, MAYOR,

Plaintiffs in Error,

versus

THE NEW ORLEANS WATER WORKS COMPANY ET AL.,

Defendants in Error.

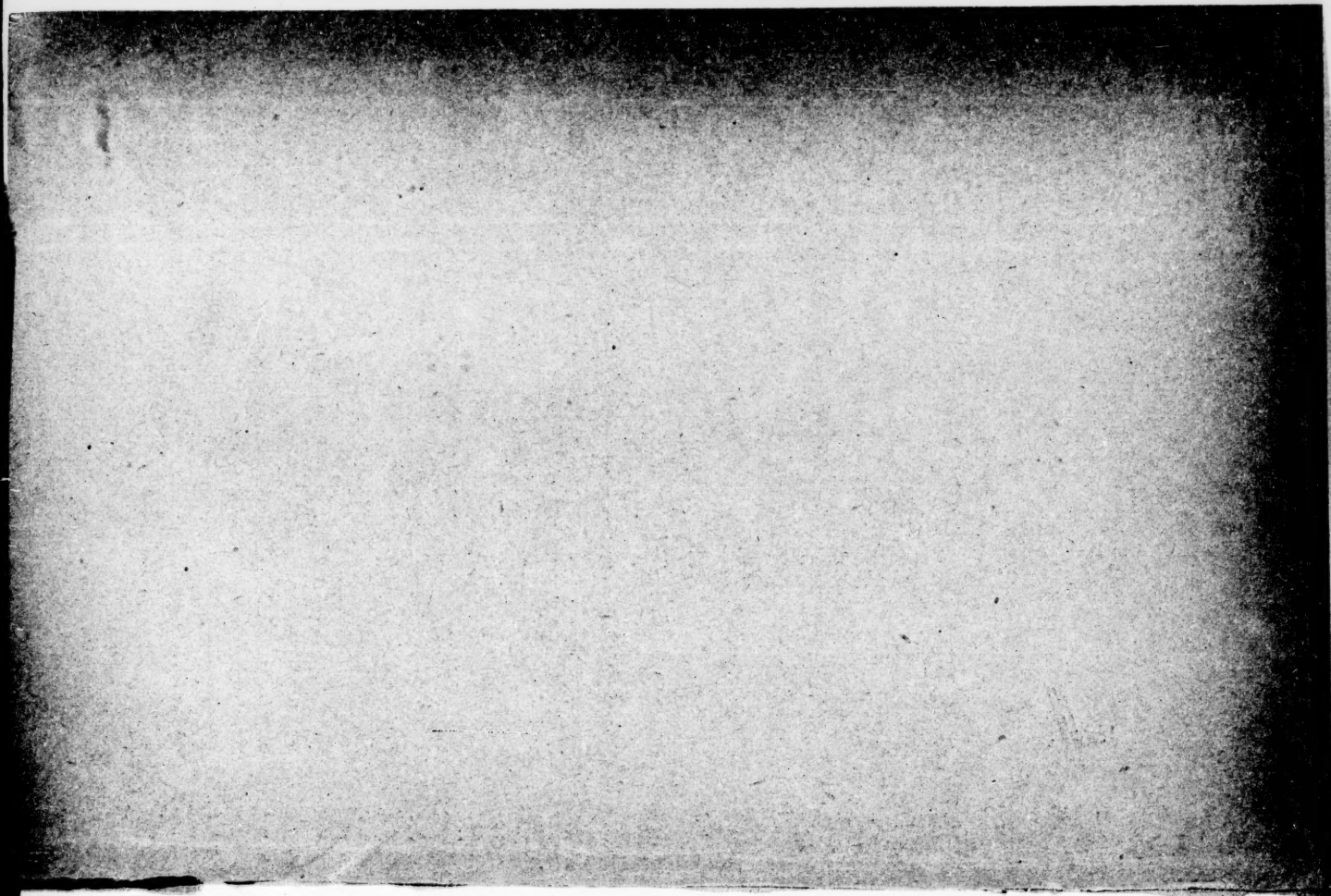
WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Brief for the City of New Orleans. The Mayor.

CARLETON HUNT,

City Attorney for New Orleans, and attorney for Joseph A. Shakespeare, mayor of the city.

L. GRAHAM & SON, 99, 101, 103 GRAVIER ST., N. O.



In the Supreme Court of the United States.

No. ~~1535~~ 632

THE CITY OF NEW ORLEANS AND JOSEPH A. SHAKESPEARE, MAYOR,

Plaintiffs in Error,

versus

THE NEW ORLEANS WATER WORKS COMPANY ET AL.,

Defendants in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Brief for the City of New Orleans. + the Mayor

STATEMENT OF FACTS AND OF THE PLEADINGS.

In 1877 the Legislature of Louisiana passed Act No. 33 of the extra session of that year, which act is printed as appendix "A." The New Orleans Water Works Company was, under the provisions of Act 33, incorporated for the purpose of furnishing a water supply to the City of New Orleans and the citizens thereof. Aside from this

great privilege, other advantages were bestowed by the Act, and these include the monopoly of the privilege for the term of fifty years.

By Section 9 of the Act in question, it was provided that the supply of water to the City of New Orleans should be free, and in consideration thereof, that the franchises and property of the Company should be exempt from taxation—State, municipal and parochial.

In the following year the Charter was amended by the Legislature, by striking therefrom the exemption from State taxation.

The Constitution of Louisiana of 1868 required that taxation should be equal and uniform. Under the well established jurisprudence of Louisiana, the General Assembly was prohibited from exempting property from taxation—State, parochial or municipal.

City of New Orleans vs. Bank of Lafayette, 27 An. 376.
Same vs. People's Bank, Ib. 646.
Same vs. St. Charles Street Railroad Company, 28 An. 497.
Same vs. St. Patrick's Hall, Ib. 512.
Same vs. Bank of Lafayette, Ib. 756.

Disregarding the exemption, but acting in conformity with law, the City of New Orleans proceeded to assess the property of the New Orleans Water Works Company, and, in consequence, instituted suit for the collection of municipal taxes for the year 1881. The Company thereupon defended, and set up the plea of exemption under Section 11 of their Charter, Act 33 of 1877, already cited, and prayed the Court, in the event that the plea should not prevail, for judgment in reconvention against the City, for the value of the water unto it furnished as upon a *quantum meruit*. There was final judgment on appeal in favor of the City for the amount of taxes by it claimed for the year 1881, and in favor of the New Orleans Water

Works Company, on the reconventional demand, for an exactly similar amount for the water supply furnished by it to the City during that year. The Supreme Court of Louisiana, in arriving at this conclusion, considered Section 11 of Act 33 of the Acts of 1877, and gave it force and effect, although the Court did not coincide with the Water Works Company in its view thereof. Section 11 was not annulled, but it was equitably interpreted and applied by the Court. The judgment of the Supreme Court of Louisiana became final, and the Water Works Company acquiesced therein.

The fact of acquiescence does not appear in the Record in the present suit, but does in Record No. 73 of the October term of 1889 on the docket of this Court, in the suit entitled: New Orleans Water Works Company, Plaintiffs in Error, vs. The City of New Orleans, Defendant in Error, wherein the plaintiffs in error moved to discontinue the appeal taken by them from the judgment in favor of the City of New Orleans by the Supreme Court of the State just referred to.

After the rendition of the judgment of the Supreme Court of Louisiana in question the Legislature, at its session in the year 1884, passed Act No. 56, which is annexed hereto and printed as exhibit "B."

Assuming to act in consequence of the Act, the Common Council of the City of New Orleans adopted Ordinance No. 909, Council Series. The Act is annexed and printed as exhibit "C."

By virtue of the authority conferred in the ordinance, the then Mayor of the City assumed to enter into a notarial contract with the New Orleans Water Works Company, a copy of which is annexed and printed as exhibit "D."

Thereupon a committee of citizens composed of E. Conery, Jr., *et als.*, instituted judicial proceedings in order

to have the contract, Ordinance No. 909, and Act 56 of 1884, annulled and set aside on various grounds. The Water Works Company and City of New Orleans were made defendants. The Company set up a special defence; the City, after excepting, pleaded the general issue.

Subsequent to this action there was a change in the administration of the municipality, and the Common Council passed Ordinance No. 3287, Council Series, on Oct. 23, 1888, directing the City Attorney to amend the pleadings of the City, and to join the plaintiffs against the Water Works Company. The Ordinance is annexed and printed as exhibit "E."

Thereupon the City petitioned the Court to be permitted to file an amended and supplemental answer, wherein it is pleaded: "That, by the terms of Act No. 33 of the E. S. of 1877, the City is entitled to a supply of water from the New Orleans Water Works Company free of charge, and that the guarantee of this law to the City, securing to it the benefits of free water, has not been and can not be diminished without impairing the obligation of contracts, and thereby violating Article 1, Section 10 of the Constitution of the United States; and the City now pleads said Article 1, Section 10, and invokes the benefit thereof, and further pleads said Act No. 33 of 1877, E. S., as a part of this answer. That, notwithstanding the premises, the late Council of the City on the twenty-third day of September, 1884, did unlawfully pass Ordinance No. 909, C. S., whereby the terms of said Act No. 33 were attempted to be frustrated and set at naught, to the great detriment and injury of the City of New Orleans, and in derogation of the rights of the City, and of those of the inhabitants.

"That in pursuance of said illegal ordinance, the late Mayor of the City entered into an alleged contract with the New Orleans Water Works Company Oct. 3, 1884, be-

fore Jos. D. Taylor, notary, and the said alleged contract is null and void; that it is under color of giving force and effect to another Act of the General Assembly of this State, to-wit: Act No. 56 of 1884, in direct violation of the terms of said Act No. 33, in that it imposes heavy and burdensome charges on the City of New Orleans for a supply of water, to be paid said Water Works Company contrary to the terms and guarantee of said Act No. 33.

"That the alleged contract here referred to, and Ordinance No. 909, which forms a part of this contract, and on which it is based, are *ultra vires*, null and void, the same being without authority of law, and in direct violation of acts of the Legislature Nos. 33 of the extra session of 1877, 43 of 1878, 20 of 1882, and 56 of 1884.

"That in the decision in the cause of The City of New Orleans vs. The New Orleans Water Works Company, reported in the 36th Louisiana Annual Reports at page 432 *et seq.*, the Supreme Court of Louisiana placed a construction and judicial interpretation of said Section 11 of the Act No. 33, and that the Supreme Court, in deciding said cause, determined the effect of the legislative contract between the City of New Orleans and the Water Works Company by virtue of said Act No. 33 of 1877, and declared that the Water Works Company, under and by virtue of the said contract, has no power to demand or claim or require from the City of New Orleans, in any year, any sum for the water supply which it was bound under its Charter to furnish to the City, greater than the amount of the City taxes for that year. * * *

"That said Ordinance No. 909 is contrary to Acts Nos. 53 of 1877, and 56 of 1884, and the decree of the Supreme Court in said case of the City of New Orleans vs. New Orleans Water Works Company, and is in direct violation thereof, in this, that it ordains payment to the Water Works Company, of rates extortionately in excess of the

amount fixed by the Legislature, and accepted by said Company, under said Section 11, Act 33 of 1877, and the decree of the Supreme Court hereinbefore referred to; and actually amounting in the year 1885 to $68,340, while the taxes of said Company for that year are only $11,352."

* * *

It is further pleaded:

That Ordinance "909 C. S. is an ordinance to carry out Act No. 56 of the Acts of 1884," as declared in the title to said Ordinance, and that it violates the Constitution of the State of Louisiana (Art. 57, annexed and printed as exhibit "F"), which declared that the General Assembly shall have no power to release or extinguish, or to authorize the extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to this State, or to any parish or municipal corporation therein; and that the ordinance also violates Art. 45 of the State Constitution, which declares that the General Assembly shall have no power to grant, or to authorize any parish or municipal authority to grant any extra compensation, fee, or allowance to a public officer

Later on an appeal was taken in behalf of the city, but the Court dismissed the appeal, holding that the city had been considered and treated as plaintiff, and appellee, throughout the whole trial. *Edward Conery, Jr., et al.* vs. *The New Orleans Water Works Company and the City of New Orleans, 42 La. Ann. 441.*

dispossess the City of the advantages of the contract without due process of law, and thereby to impair or to destroy the same.

Other grounds of nullity and illegality were alleged. The Water Works Company were duly cited to answer, and the decision of the Supreme Court of Louisiana in City of New Orleans vs. The New Orleans Water Works Company was specially pleaded by the City.

The Court of first instance rendered the following order on the application of the City of New Orleans to file the amended and supplemental answer, to wit; "Let this amended and supplemental answer be filed as prayed for, and the original pleadings herein amended accordingly."

The Water Works Company answered under protest.

The case hereupon progressed to trial, and there was judgment of the inferior Court in favor of the committee of citizens, E. Conery, Jr., *et als.*, the original plaintiffs, and against the City of New Orleans and the New Orleans Water Works Company, declaring Ordinance 909, and the contract between the City and the Company annulled, and forever enjoining the City from paying anything thereunder.

As this judgment of the Civil District Court for the Parish of Orleans was in accordance with the petition and prayer of the City of New Orleans in its amended and supplemental answer, the City did not appeal. The only party who felt aggrieved was the Water Works Company, and it alone appealed to the Supreme Court of the State. The committee of citizens and the City of New Orleans, who necessarily became identified after the filing of the amended and supplemental answer by the City, thereby became appellees in the Supreme Court of Louisiana.

The judgment of the lower Court was reversed by the Supreme Court of the State. Act No. 56 of 1884, Ordi-

nance No. 909, and the contract thereunder were declared legal and valid and binding on the City of New Orleans.

In its opinion, the majority of the Court held, that the City, under its police power, as set forth in its Charter, regardless of Act 56 of 1884, and in disregard of the contract rights contained in Section 11, of Act 33 of 1877, as determined in and vested by the final decision of the Supreme Court of Louisiana in the case of City of New Orleans vs. New Orleans Water Works Company, 36 An.p. 436, had the right to pass Ordinance 909 and to make the contract entered into thereunder. A decision was thus rendered by the Court which deprived the City of its property rights in and to a contract, and in and to a final judgment in it's favor, and setting aside and impairing the obligations of the contract, and in favor of the validity of the State statute and the authority of the Council exercised under the State, where the validity and authority of the statutes, ordinance, and contract are drawn in question. The effect is to deprive the City of New Orleans of property without due process of law, and the judgment is repugnant to Article 1, Section 10, of the Constitution of the United States. The law authorizing Ordinance 909 and the ordinance itself are alleged by the City to be *ultra vires*, null and void. See exhibit annexed and printed as "G," for Section 7 of the Charter of the City of New Orleans, adopted June 23, 1882.

Thereupon the City of New Orleans, and Joseph A. Shakespeare, Mayor of the City, and entitled under the jurisprudence of the State in his capacity of chief magistrate to test before the courts the legislation of City ordinances, and E. Conery, Jr., *et als.* applied for and obtained writs of error from this Court to the Supreme Court of Louisiana.

Genois, Mayor, etc., vs. Lockett et al., 13 La. R. 545.

The motion of the New Orleans Water Works Company

to dismiss, now under consideration in this Court, is based upon the allegation that there is no federal question involved, and that the Court is consequently without jurisdiction. Without advancing further in discussion, the foregoing statement of the facts of the case must, it is submitted, defeat the motion.

The judgment of the Supreme Court of Louisiana became final Nov. 18, 1889. On the 26th day of November, at the last meeting of the City Council in the month, and at the meeting at which all financial ordinances are presented on their first reading, the bill of the New Orleans Water Works Company was presented, read and referred to the proper authority for examination.

On the twelfth day of December, the second meeting after its introduction, the ordinance was read in conformity with law a second time and finally passed. The Mayor's signature was thereupon affixed to it and the Water Works Company enabled to obtain its money from the City treasury, where it has had positive assurance and knowledge that it has been lying since the issuance of the injunction by the lower Court as being set apart by actual appropriation in the annual budget. There never has been at any time, or in any manner, any attempt on the part of the City to hold this money in the treasury by virtue of the writ of error issued herein. No claim has ever been set up to the effect that the writ operated as a supersedeas. The Council was advised in writing to the contrary, and the letter of advice was published in the newspapers. These are facts which, while they may not appear in the Record, are recited simply for the purpose of showing that the Water Works Company is not now suffering pecuniarily, and never has suffered, on account of the writ herein; and also for the purpose of showing, that the City of New Orleans is abundantly able, willing, and anxious to discharge its contractual obligations to the Company. It is

to this end that application is made to this Court to determine the same. The City of New Orleans now comes into Court, with conscious rectitude, and with clean hands.

ASSIGNMENT OF ERRORS.

In the petition for the writ of error, filed November 18, 1888 (T. R. page 196), errors were, it is believed, duly assigned. They therefore come up to this Court with the record itself. To the end, however, that all errors appealed from, may be brought to the knowledge of the Court, through the brief, an assignment is now here made.

FIRST ERROR.

The City of New Orleans having set up in its amended and supplemental answer, or pleading, and it having been duly shown, that the City has a right to a supply of water from the New Orleans Water Works Company, free of charge, under and by virtue of the terms of Section 11 of Act No. 33 of the Extra Session of 1877, of the Legislature of Louisiana; and that Section 11 of said Act rightfully constitutes, and has the force and effect of a contract entered into between the State of Louisiana and the New Orleans Water Works Company, and whereby the City of New Orleans is, under Article 1, Section 10, of the Constitution of the United States, and under Articles 45 and 57 of the Constitution of the State of Louisiana, secured in the supply of free water for the uses of the City, the Supreme Court of Louisiana, notwithstanding, denied the right asserted by the City, and pronounced against the validity of the contract, and in favor of the validity of Act 56 of the Acts of the General Assembly of Louisiana, of 1884, in violation of Articles 45 and 57 of the Constitution of Louisiana, and Article 1, Section 10, of the Constitu-

tion of the United States, attempted to impair and annul the contract. This was error.

SECOND ERROR.

The City of New Orleans having set up in its said amended and supplemental answer, or pleading, and it having been duly shown that the said contract, under Section 11, Art. 33 of the Extra Session of 1877, has received judicial interpretation and sanction, and is legal, valid and binding as finally determined by the Supreme Court of the State of Louisiana in the case of the City of New Orleans vs. The New Orleans Water Works Co., No. 9007 of the docket of said Court, and reported in 36 Louisiana Annual Reports, p. 432, *et seq.*, and the City, for greater certainty, having pleaded the opinion of the Court, the Supreme Court proceeded, notwithstanding, to deny the effect of the same to be a judicial interpretation and sanction of said contract. This was error.

THIRD ERROR.

The City of New Orleans having set up in its said amended and supplemental answer, or pleading, and it having been duly shown, that while said Section 11 of Act 33 of 1877 constitutes a contract, between the New Orleans Water Works Company and the State of Louisiana, and while the same contains a stipulation in favor of the city, and providing for a supply of water to it free of charge, a later act of the Legislature of Louisiana, *No. 56 of the acts of 1884*, and a certain ordinance of the City of New Orleans, *No. 909, C. S.*, approved September 23, 1884, and a *certain contract*, entered into thereunder, between the City of New Orleans and the New Orleans Water Works Company, before Joseph D. Taylor, Notary Public, did attempt to diminish and impair the obligations of the contract existing under and by virtue of

Act 33 of 1877, and under and by virtue of Articles 45 and 57 of the Constitution of the State of Louisiana, and thereby violated Article 1, Section 10 of the Constitution of the United States; and the city having specially pleaded said section, and said articles, and invoked the benefits of the same, and having prayed, that Act 56 of 1884, Ordinance No. 909, C. S., and the contract made thereunder be declared illegal, null and void, the Supreme Court of Louisiana notwithstanding denied the prayer, and pronounced in favor of said unconstitutional Act 56 of 1884, and said illegal Ordinance No. 909, and said illegal contract. This was error.

FOURTH ERROR.

That the City of New Orleans having set up in its amended and supplemental answer, or pleading, and having duly shown, that Act 56 of the Acts of the Legislature of Louisiana of 1884 is violative of Article 45 of the Constitution of Louisiana, which declares that "the "General Assembly of Louisiana shall have no power to "grant or authorize any parish or municipal authority to "grant any extra compensation, fee or allowance to a "public officer, agent, servant or *contractor;*" and to Article 57 of the Constitution, which declares that "the "General Assembly shall have no power to release or "extinguish, or to authorize the releasing, *in whole or in* "*part*, of the indebtedness or *liability* of any corporation "to this State or any parish or any municipal corporation "thereof;" and, that said Act 56 did not, and could not impair the rights of the City, to free water, secured to it under Section 11 of Act 33 of the Extra Session of 1877, under said Articles 45 and 57 of the Constitution of Louisiana, and under Section 10, Article 1, of the Constitution of the United States. The Supreme Court of Louisiana, however, notwithstanding, found and pronounced against the City. This was error.

FIFTH ERROR.

That the City of New Orleans, having set up in its amended and supplemental answer, or pleading Article 46 of the Constitution of the State of Louisiana of 1879, which declares that "the General Assembly shall not pass "any local or special law creating corporations, *amending*, "renewing, extending or *explaining* the charter thereof," and it having been duly shown that Act 56 of 1884 was virtually an amendment or alteration of the charter of the New Orleans Water Works Company, as set forth in Act 33 of the Acts of the Legislature of Louisiana of 1877, and which, if allowed, would divest the rights of the city under Section 11 of that Act, and in violation of Articles 45 and 57 of the Constitution of Louisiana, and of Article 1, Section 10, of the Constitution of the United States, and that there would thus be effected divestiture of the rights of the city.

The Supreme Court of Louisiana, however, notwithstanding, found to the contrary and sustained Act 56 of 1884, and pronounced against the City. This was error.

SIXTH ERROR.

That the City, having set up in its supplemental and amended answer, or pleading Article 235 of the Constitution of the State of 1879, which declares that, "the General Assembly shall not remit the forfeiture of "the charter of any corporation now existing, or renew, "*alter*, or *amend* the same, nor pass any law for the ben- "efit of said corporation, except on the condition that "said corporation shall thereupon hold its charter sub- "ject to the provisions of the Constitution," and it having been shown that the Water Works Company has never accepted this act, but has, on the contrary, declined to accept it, and that even if Act 56 of 1884 is not violative of Articles 45 and 57 of the Constitution of Louisiana,

and of Article 1, Section 10, of the Constitution of the United States, said Act No. 56 is for the reason assigned not available to the New Orleans Water Works Company.

The Supreme Court, however, notwithstanding, found and pronounced against the City. This was error.

SEVENTH ERROR.

That the City of New Orleans having set up in its supplemental and amended answer, or pleading, and it having been duly shown, even if Act 56 of 1884 is constitutional, that Ordinance 909 C. S., of the City of New Orleans, and the pretended contract of September 23, 1884, entered into by the City and the New Orleans Water Works Company, are *ultra vires;* and that the so-called contract amounts, practically speaking, to an annual gift from the City of $45,000 for water for the public purposes of the municipality, in violation of Section 11 of Act 33 of 1877, Extra Session, whereunder the water belongs to the City free of charge, and in violation of Articles 45 and 57 of the Constitution of Louisiana, and of Art. 1, Section 10, of the Constitution of the United States. The Supreme Court of Louisiana, however, notwithstanding, found and pronounced against the City. This was error.

EIGHTH ERROR.

The City of New Orleans, having set up in its supplemental and amended answer, or pleading, the decision of the Supreme Court of Louisiana, upon and finally determining the rights of the respective parties in said suit, *City of New Orleans vs. The New Orleans Water Works Company*, No. 9007 of the Docket of the Court, *36 La. An. Reports, p. 432, et seq.*, the parties to said *suit*, and to the present *suit*, being the same.

The City claimed said judgment to belong to it, and to

be its property. The City claims now that the same can not be divested without due process of law, and that said Act 56 of the General Assembly of Louisiana of 1884, and said Ordinance 909, C. S., and the contract made thereunder, would operate divestiture of petitioner's property, and the destruction of said judgment, No. 9007, in violation of Article 5 of the Amendments of the Constitution of the United States. The City claims under said Article and invokes the benefit of the same.

The Supreme Court of Louisiana, notwithstanding, however, found and pronounced against the City. This was error.

ARGUMENT.

Nov. 2, 1885, E. Conery. Jr., *et als.*, residents of New Orleans, alleging themselves to be taxpayers to the City in a sum exceeding $10,000, brought suit against the City and the New Orleans Water Works Company, to restrain the execution of the contract entered into before Joseph D. Taylor, City Notary, between the City and said Water Works Company, Oct. 3, 1884 and to prevent the Council of the City from making any appropriation out of the public treasury in furtherance of the contract and of Ordinance No. 909, C. S., approved Sept. 26, 1884, authorizing it; and further asking that the contract and Ordinance in question be declared null and void.

The petition charges as the ground of nullity, that the contract and Ordinance here referred to are in express violation of the terms of the charter of the Water Works Company, and are *ultra vires*, unconstitutional, and therefore null and void. The petition sets forth at length the causes or reasons of the illegality and nullity by it propounded. These are all included, as well as enlarged upon, in the supplemental answer of the City.

May 27, 1887, the City appeared for the purpose of filing its answer, and pleaded the same as follows, to wit:

"And now comes Walter H. Rogers, City Attorney for

the City of New Orleans and for and in behalf of the City of New Orleans and all of the defendants except the New Orleans Water Works Company, and reserving all and singular the exceptions hereinbefore pleaded herein, and in no manner waiving the same, for answer to the said plaintiffs' petition denies all and singular the allegations therein contained in manner and form, as the same are set forth and contained in said petition and prays judgment against the said plaintiffs' demand with costs."

(Signed) W. H. ROGERS,
City Attorney.

A new City administration having been elected by the people, came into power Monday April 23, 1888; and the Council thereunder, having so instructed the City Attorney, selected by themselves, by Ordinance No. 3287, approved Oct. 26, 1888 (a copy of which is annexed hereto, printed exhibit H), an amended and supplemental answer (not *intervention*), leave of the Court being first had and obtained, was filed setting forth the binding force and effect of the charter of the Water Works Company as interpreted by the Supreme Court in the case of City of New Orleans vs. the Water Works Company, 36 An. 432, averring the invalidity and nullity of Ordinance No. 909, and of the contract entered into thereunder between the former City administration, on behalf of the City, and the Water Works Company on various grounds; and among others, those especially charging that said Ordinance enacted under the present City charter of New Orleans, and being Act. No. 20 of the session of the Legislature of 1882, or under Act No. 56 of 1884, together with said acts, if they permitted such an Ordinance, were in violation of Article 1, Section 10, of the Constitution of the United States, and in effect, deprived the City of New Orleans of her property in and to the contract contained in Section 11 of Act 33 of 1877, and of its rights in and to the judgment in its

favor in the case of City of New Orleans vs. New Orleans Water Works Company, 36 An. R. 432, without due process of law.

To say that the City had an *ex parte* order from the judge to file its amended and supplemental answer, is only to say that the City proceeded legally and in due form. The Code of Practice of Louisiana, Arts. 419 and 420, provides that, after issue joined, the plaintiff may, *with the leave of the Court*, amend his original petition. * * * The defendant may then amend his answer.

On application by the City to the Civil District Court in this case, the following order was issued: Let this amended and supplemental answer be filed as prayed for, and the original pleadings herein amended accordingly.

(Signed) F. A. MONROE, *Judge.*

New Orleans, Nov. 2, 1888.

"An amendment to the petition once allowed forms "part of the pleadings, and plaintiffs' demand is precisely "what it would have been had the original and amended "petition been filed at the same time; so that the Court "must decide on both, and can not give judgment on "one only."

Hennen's Digest, *verbo* Pleadings IX, par. 2, p. 1182.

Lanusse vs. Massicot, 3 Martin's (La.) Reports, p. 41.

King vs. Wartelle, 14 Annual (La.) Reports, p. 750.

The plea of defendant in error, that the City was judicially estopped from changing its position and joining E. Conery, Jr., *et als.*, the original plaintiffs in this cause, if allowed, would virtually hold the City responsible for all of the errors its officers might commit. Under such a view the City would be disabled from attacking any of the contracts entered into by its officers, except for fraud, and would be firmly bound thereby, and by all pleadings, however erroneous, filed by its representatives. But this

is contrary to the settled jurisprudence of the State, to the law as laid down by the text writers, and to repeated decisions in this Court.

In Municipality No. 2 vs. New Orleans Cotton Press, 18 La. Reports, p. 274, Judge Martin said:

"Corporations in the civil law are considered as in a "continual state of pupilage; and their administrators as "the tutors of minors. Until very lately minors were en- "titled to relief in all cases in which they could show "that a proper defence had not been made for them. It is "not very clear that the same right does not exist in favor "of a corporation whose interests have been neglected by "its administrators. IN THOSE CASES THE CITY MIGHT "HAVE SACRIFICED ITS OWN RIGHT, BUT NOT THAT OF THE "PUBLIC."

In *Millaudon vs. the First Municipality of New Orleans*, 1 An. R. 215, where the evidence in the Record showed that much more important evidence existed, and was actually before the Court and within the power of the First Municipality, Chief Justice Eustis said:

"Those charged with the government of this munici- "pality and with the management of its important con- "cerns are not the parties in interest in this suit; it is the "taxpaying inhabitants who are to be affected by its re- "sult. Were the former alone concerned, we should be "justified in leaving them to the consequences of their "own acts; but we can not consent to adjudicate finally on "the right of the latter in a case presented to us as this is."

In *Delabigarre vs. Second Municipality*, 3 An. 235, 236, where it was urged on behalf of the plaintiff that there was no danger of eviction, because a certain judgment on Gravier's case formed *res judicata* between the plaintiff and the municipality, Justice Rost said:

"One of the essential requisites to maintain the excep- "tion *res judicata* is, *ut sit eadem causa petendi*. The

"City, in *Gravier's* case, did not set up title to the bat-
"ture, but claimed it exclusively as a *locus publicus*,
"under a dedication by *Gravier*, and the use of the pub-
"lic ever since the establishment of faubourg St. Mary.
"The plea now made presupposes the issue to be the
"same in this suit. It waives, therefore, the exception
"in the brief, that the defendants, having set up title in
"themselves, are bound by that plea, and can not change
"the nature of their defence. In conformity with
"the views expressed in the case of *Millaudon vs. First*
"*Municipality of New Orleans* (1 An. 215), we would
"not in any case of which we have the control be dis-
"posed to hold the corporation responsible for the errors
"of their agents in pleading or in defending suits; but
"here the very ground assumed by the plaintiffs waives
"an informality which might as well perhaps not have
"been alleged, as the plaintiff herself had committed
"errors in her pleadings which she rectified in the sup-
"plemental petition."

In *Brown vs. Police Jury of Madison*, 4 An. 181, where the question of law presented was whether the plaintiff was bound to discuss the land upon which a certain levy has been made, before he could proceed against the parish, and the Court found that under the act of 29 the land was directly liable to the plaintiff, and that if he resorted to his remedy, the land would have been purchased by the Police Jury for a sum sufficient to pay him, and the privilege which he had would have thus inured to their benefit; Justice Rost said: "We think they can not
"be deprived of this right. It is urged that the defend-
"ants have alleged in their answer, that the remedies
"secured to plaintiff by law were lost in consequence of
"the acts and omissions of their officer, and that, under
"this judicial admission, the plaintiff could proceed
"directly against the parish, as was done in the case of
"*Newcomb vs. Police Jury, etc., 4 Rob. 233.*

"The defence of the Police Jury was perhaps ill "advised. But the plaintiff has proved that it was "unfounded, and that all the formalities required had "been complied with. Considering that the Police Jury "are nominal defendants, and that it is the taxpayers of "the parish who are to be affected by our decision, we "can not hold them to allegations made in error by their "agents. Millaudon vs. First Municipality, 1 An. 215."

In *Benham vs. Parish of Carroll*, 28 An. 343, suit had been instituted upon several parish warrants of the parish of Carroll, and the parish, through the District Attorney, answered, denying any indebtedness to plaintiff as set forth, and averring that the warrants sued on were issued without authority of law, and it was set up, that if the Police Jury had contracted any debt in favor of plaintiff or any former holder of the warrants, the parish was not bound, because the defendants creating the debt did not provide the means of paying the same; that no consideration for said warrants inured the parish, and that they were procured by fraudulent combination between the plaintiff and the majority of the Police Jury. There was a judgment in favor of the plaintiff, and the parish appealed. Afterward a motion was made to dismiss the appeal, among other grounds, because the judgment was confessed in the lower Court by defendants.

Justice Howell said: "There is in the Record an ordi-"nance of the Police Jury, purporting to have been "adopted after the institution of this suit, and after the "defence was set up, and confessing judgment in this "suit for the amount claimed.

"If the Police Jury were without authority to issue the "warrant sued on, they were without authority to bind "the parish by confessing judgment for their amount. "Such action would be taking advantage of illegal or "usurped authority, which courts of justice can not sanc-

" tion. The lower Court seems not to have regarded the " alleged confession. The motion is denied."

In *Marchand vs. Noyes et al.*, 33 An. 884, where the plaintiff having recovered a final judgment against the Mississippi and Mexican Gulf Ship Canal Company, issued a *fi. fa.* and served garnishment process with interrogatories upon the City of New Orleans, and the interrogatories were taken for confessed, and it was shown that through some accident or inadvertence the matter had escaped the attention of the Mayor, the Supreme Court ruled, that it was clearly within the power of the Court below, in the exercise of a sound discretion, to set aside judgment before signature, and grant a new trial. Justice Fenner said :

" We think, in the present case, its discretion was " soundly exercised for the reason assigned by the judge, " that a municipal corporation should not be made to " suffer for the unintentional neglect of an officer, like " the Mayor, overwhelmed with a multiplicity of public " duties."

In the learned work of *Bigelow on Estoppel, Fourth Edition, p. 530*, where that writer discusses the right of a corporation to deny the acts which it has assumed to do, he goes on to say:

" The more important question is, when, if at all, may " a corporation repudiate its undertaking by alleging " that the undertaking was without its powers ? Great " confusion among the earlier authorities will be found " in the answer given to this question, nor are the recent " cases in perfect harmony. It appears, however, to be " agreed by the better authorities of the present time, " that if the act undertaken was in or of itself *ultra vires* " of the corporation, no act of the body will have the ef- " fect to estop it, to allege its want of power to do what " was undertaken. The powers of the ordinary corpo-

"vation being dependent upon the statute which created "the body, those powers can not, of course, be enlarged "by the body itself: and the act in question being in "itself *ultra vires*, the corporation can not make it other "wise whether directly or indirectly."

The same doctrine, supporting as it does, undoubtedly, the case of the City now before the Court in the general, and, in particular, the attitude of the municipality upon the Record, is to be found in the text book of Judge Dillon on *Municipal Corporations*, *Volume 2*, page 430, Section 457. He says:

"The general principle of law is settled beyond con- "troversy that the agents, officers, or even the City "Council of a municipal corporation, *can not bind the cor- "poration* by any contract which is beyond the scope of "its powers, or entirely foreign to the purposes of the "corporation, or which (not being in terms authorized) "is *against public policy*. This doctrine grows out of "the nature of such institutions, and rests upon reasona- "ble and solid grounds. The inhabitants are the cor- "porators: the officers are but the public agents of the "corporation. The duties and powers of the officers or "public agents of the corporation are prescribed by "statute or charter, which of persons not only may "know, but are bound to know. The opposite doctrine "would be fraught with such danger, and accompanied "with such abuse, that it would soon end in the ruin of "municipalities, or be legislatively overthrown."

In *South Ottawa vs. Perkins*, 94 U. S., p. 201, where the town of South Ottawa had issued certain bonds by virtue of a pretended act of the General Assembly, duly published among the statutes of that State, and therefore *prima facie* valid, the Supreme Court of the United States held that the town was not estopped from denying the passage of the act, notwithstanding the holder of the

bonds was a *bona fide* purchaser, without actual notice. The precise point of interest just here is that the Court declined altogether to apply the doctrine of estoppel to the action of the municipality. It mattered not that the bonds in question had been uttered. It mattered not that the first instalment of interest had been actually paid upon them. So much was in point of fact conceded: but what was of import in *South Ottawa vs. Perkins*, according to the doctrine of the Court, was whether the action of the town in issuing the bonds had been authorized. Said the Court:

"It would be an intolerable state of things if a docu-
"ment, purporting to be an act of the Legislature, could
"thus be a law in one case and for one party, and not a
"law in another case and for another party: a law to-day
"and not a law to-morrow: a law in one place and not a
"law in another in the same State. And whether it be a
"law or not a law, is a judical question, to be settled and
"determined by the Courts and judges. The doctrine of
"estoppel is totally inadmissible in the case."

In *Anthony vs. County of Jasper*, 101 U. S. 693, the Supreme Court enforced a like ruling with that in *South Ottawa vs. Perkins*. A township in Missouri voted to subscribe for stock. The proper county court made the subscription, and ordered issuance of the bonds. These were issued, sealed with the seal of the court, signed by the clerk and by a certain person as presiding justice, who, however, did not become so until some time afterward. His action had not been consented to by the county court nor his Associate Justice, and the bonds were not registered, certified and endorsed, as the law of the State required.

The Court said: "Dealers in municipal bonds are
"charged with notice of the laws of the State granting
"power to make the bonds they find on the market.

" This we have always held. If the power exists in the " municipality, the *bona fide* holder is protected against " mere irregularities in the manner of its execution, but if " there is a want of power, no legal liability can be " created."

So in *Northern Bank of Toledo vs. Porter Township, Trustees*, 110 U. S., p. 612, it was decided by the Supreme Court, that a township is not estopped from showing that a corporation is without legislative authority to issue bonds, and this, notwithstanding payment of interest by it upon the same for years.

The Court said: " The fundamental proposition " advanced in behalf of plaintiff is, that immediately " upon the passage of the act of March 21, 1850, Porter " Township was vested with power to make a subscription " to the stock of the Company, that the non-authorization " of the commissioners, by a vote of the electors, to make " a county subscription, was only a condition precedent " to the exercise of that power; consequently, that the " township is estopped by the recitals in the bonds, and " its acquiescence for a series of years, as evidenced by " payments of interest, to rely upon the non-fulfilment of " that condition. In this construction of the acts in " question we are unable to concur."

The principles and doctrine which underlie the decisions here referred to are derived from the best and purest sources. The Roman civil law is the basis of the jurisprudence of the State of Louisiana, and they are traceable to the text itself of that law.

A city is not bound by the loans of its agents, except those loans have enured to the city's advantage.

Civitas mutui datione obligare potest si ad utilitatem ejus pecuniæ versæ sunt: alioquid ipsi soli qui contraxerunt, non civitas, tenebuntur. L. 27 ff. ad municip.

Officers of the municipality are merely *ad rempublicam*

administrandam. Bechard Droit Civil Municipal, p. 306. The obligations of a city are not those of its agents, but those of the community. Id. quæ sup.

In the Roman law of municipalities, want of authorization is a matter of public law, and may be set up by the municipality at any time, and in France, even in the Court of Cassation, by the municipality which may have been sacrificed. Fauchet Code des Municipalities, Vol. II, p. 85. "Les Communes," says Fauchet, "sont asssimila-"bles aux mineurs quant a leurs engagements soit con-"tractuelles, soit judiciaires." Fauchet, p. 90.

In *Peake vs. New Orleans*, 139 U. S., p. 359, a case to which long consideration was given, this Court, it is believed, made direct application of the doctrine in question, to the corporation of the City of New Orleans. Said the Court, speaking through Mr. Justice Brewer: "It must "be borne in mind that a city is not like a private indi-"vidual, with absolute freedom of contract and donation. "It is simply the representative of the citizens and tax-"payers, a trustee for their interests; it has no general "powers of donation, and its contribution to a fund can "never be considered as a donation when there is an in-"debtedness to that fund to be discharged."

It appears, it is submitted, from the reasoning and from the authorities which have now been laid before the Court, that the City of New Orleans (if it can be shown that Ordinance No. 909, C. S., adopted and approved under the late City Administration, and the contract before Joseph D. Taylor, of date Oct. 3, 1884, are beyond the powers of the municipality) is not in law bound by the ordinance and contract, and if the pleading filed in behalf of the City, in the time of the administration, which has been referred to, imports any admissions, that the City is relievable from all effects of the same, and completely reinstated in its capacity as a litigant by the order rendered

by the Civil District Court, on the occasion of the filing by the City of the amended and supplemental answer.

The rule of practice in the State of Louisiana is clear and familiar. Amendments may be allowed at any stage of the cause for the furtherance of justice. They are reducible to no certain rule, and must be left to the sound discretion of the Court. The true principle is, that an amendment should or should not be permitted to be made, as it would best tend to the furtherance of justice.

If this conclusion be correct, the right to amend and supplement its pleadings in this case belongs clearly to the City of New Orleans, and was properly exercised. The amendment must therefore stand, and the evidence offered by the City be admitted thereunder. If, indeed, to take this position involves error, then is the City reduced to a condition which would be deplorable. Its interest and welfare must be constantly, if not, at least, very often imperiled. But this can not be, nor has it ever been understood to be the case, nor to accord with the law and practice of the Courts of Louisiana.

Apart, however, from this view, it is submitted, that it was for the Court below to say when the supplemental and amended answer in question was tendered, whether it was allowable. Having permitted it at that time, and consented to the amendment as therein prayed for, reformation of the pleadings was accomplished and is now complete; nor can the action of the court be now recalled. The act sought to be disputed is over and can not be undone.

JURISDICTION OF THE COURT TO REVIEW THE CASE, AND UNCONSTITUTIONALITY OF THE CONTENTION OF DEFENDANT IN ERROR.

Having endeavored to establish, that the City of New Orleans was properly before the Court below, as plaintiff on the trial of this cause, it now becomes necessary to

show that this Court has jurisdiction to review the judgment of the Supreme Court of Louisiana.

As has been indicated already, one of the allegations in the amended and supplemental answer of the City is that Ordinance 909 and the contract thereunder are in violation of the terms of the contract entered into by the State of Louisiana and the Water Works Company, for the use and benefit of the City of New Orleans, and as contained in Section 11 of act No. 33 of 1877. The City stood in form and manner upon the contract, and proceeded to invoke the Federal Constitution, Article 1, Section 10, in its aid and for its protection.

Successive Constitutions of the State of Louisiana have made of New Orleans, and her first Judges have found in the City a permanent functionary of Government.

Hennen's Dig. Vol 2, p. 970. Verbis New Orleans, 11. C., No. 7.

Justice Rost in *Egerton vs. Municipality, 1 An. R. 437*, declares that the City is entitled to peculiar powers and privileges; and the Supreme Court of the United States, speaking by Justice Field in *United States vs. New Orleans*, 98 U. S., p. 393, has correctly observed that the powers of the City authorities are unusually enlarged.

The City is a political corporation, recognized in the Constitution, but chartered by the Legislature. Among other privileges granted, it is given the right to pass ordinances. In pursuance hereof it adopted Ordinance 909 in the forms prescribed in the charter, and either by virtue of the charter, or in supposed conformity with Act No. 56 of 1884, Ordinance No. 909 has the effect of an enactment of the Legislature. *Roderick vs. Whitsen, 4 N. Y. S. Reports 112.*

As has been seen, the amended and supplemental answer of the City of New Orleans, set up and formall

pleaded a valid and subsisting contract entered into between the State and the Water Works Company, for the benefit of the inhabitants of the City; That the late Mayor of the City and the Water Works Company, had attempted to enter into a different and more onerous contract than the one made by the State with the Company, and to bind the city under the contract; That the Mayor had acted under an illegal, null, and void ordinance, No. 909, and that the action of the City Council and the Mayor was *ultra vires*, null, and void, and did not and could not bind the City and deprive it of its contractual and judicially determined rights under Section 11 of Act 33 of 1877, and the judgment of the Supreme Court of Louisiana in the case of *City of New Orleans vs. The New Orleans Water Works Company, 36 An. R. 432.*

The effort to do this on the part of the legislative department of the City Government is an evident attempt to deprive the citizens of New Orleans of their property in said contract without due process of law; and is consequently violative of Article 14, Section 1, of the amendments to the Constitution of the United States.

In its pleadings in the present suit, the Statutes, the Ordinance, and the authority in question, and any and all Statutes authorizing said Ordinance and Contract, the City alleges to be invalid, on the ground, among others, of their being repugnant to the Constitution of the United States, Art. 1, Section 10. Now, the decision rendered by the Supreme Court of Louisiana, to which error is attributed, is in favor of their validity, and furthermore, that decision deprives the City of its rights in and to the contract of 1877, and of a former judgment rendered by the same Court in its favor.

The Court in its decision says: "The City of New "Orleans, by virtue of her inherent police powers, then had "a right to contract with reference to a water supply for "the public health and to extinguish fires. * * *

"In making the contract now attacked, did the City of "New Orleans exceed any limitation placed upon her in "the exercise of her police powers? Her Charter is silent "as to restrictions. In it there is no regulation of any "price as to the water to be supplied, nor is there any "restriction as to the quantity or the character of the "water. Act 56 of 1884 authorizes the City to contract "for either clear or filtered water, and gives the City full "discretion as to price and conditions. * * *

"In the instant case, the City of New Orleans had full "power to contract, without restraint as to price, quality "or kind of water. * * *

"The City, like a person, having the power to do so, "can alter, change, or abrogate her contracts with the "consent of the other contracting party. * * *

"We are of opinion that independent of any statutory "provision subsequently enacted, authorizing the City to "contract for her water supply, that she had the full and "plenary power to do so under the provisions of her "*Charter*. * * *

"We conclude that Act 56 of 1884 does not violate the "Constitution of the State, and that *Ordinance No. 909*, "passed by the City Council in pursuance of said act, *is a* "*valid ordinance*, and that the contract made between the "City of New Orleans and the Water Works Company "in pursuance of the power vested in said City by its "present Charter and said Act 56 of 1884, and said ordi- "nance, dated Oct. 3, 1884, and passed before J. D. "Taylor, notary public, on said day, is a legal and valid "contract."

The jurisdiction of thisCourt has been already established by the pleadings and by the decision of the Supreme Court of Louisiana just quoted from. The allegation of the City to the effect that Ordinance No. 909 passed by authority of the State, and the State statutes authorizing the passage of

the same, impaired the obligation of the contract entered into between the State and the Water Works Company, for the benefit of the City, as evidenced by Section 11 of Act 33 of 1877 is too clear, it is submitted, for serious doubt.

The other allegation of the city is that the said statutes and ordinances are *ultra vires*, null and void. It results necessarily that the citizens of New Orleans are deprived of their property without due process of law. The decision of the Supreme Court of Louisiana takes from and dispossesses the City of the benefits of its contract, and of its rights under the final judgment in its favor in City vs. New Orleans Water Works Company, 36 An. 432.

The officers of the City, it is submitted, are not at all in the case of persons acting individually. They differ from such persons in many ways. To mention none other, they act in a fiduciary capacity, and they can only act in the manner and concerning those matters indicated in the law which authorizes them to act. Under the State Constitution of 1879, the Legislature itself, apart from every other consideration, is expressly disabled from authorizing a municipality, under color of contracting, to diminish the obligations of any contractor.

Concerning the matters involved in the instant case, the State Legislature had, in 1877, exercised power to contract with the Water Works Company, and taken that power away from the City of New Orleans. The Legislature themselves made a contract with the Company. The City, therefore, was expressly deprived, it is believed, under its then existing Charter, and is deprived under its present Charter (Act No. 20 of 1882, see exhibit "G.") "from altering, changing or abrogating her contract with "the consent of the other contracting party." It is submitted, accordingly, that the Supreme Court of Louisiana fell into manifest error in making the ruling under consideration; and when it decreed the validity of the con-

tract in question, and that of Ordinance 909, and that of the State Statutes authorizing the same; and it is further submitted, that the effect of this decision of the Court is to deprive the citizens of New Orleans of their property by finally enforcing the illegal State and municipal legislation involved.

In addition to the illegality and nullity, which are thus made apparent, it is to be observed that the ordinance complained of is null and void, because, in point of fact, as well as of law, the City Charter, Act 20 of 1882, confers no authority on the Council to abrogate the contract made by the State with the Water Works Company. The Charter is absolutely silent on the subject, and so long as the New Orleans Water Works Company is in operation, the contract in question can not be interfered with, without the special consent of the State, as one of the parties thereto.

The State of Louisiana did not, by Act 56 of 1884, and she could not give her consent to the City of New Orleans to "alter, change or abrogate her contract, with the consent of the Water Works Company," for the reason that Article 57 of the Constitution of 1879 provides: "The General Assembly shall have no power to *release* or extinguish, in whole or in part, the indebtedness, liability, or *obligation of any corporation* or individual, to this State, or to any parish or *municipal corporation therein*."

To argue then, as is done for the Water Works Company, that the City of New Orleans may alter, change or abrogate its contract with that Company, now under consideration, is to assume that the City may release or extinguish, in whole or in part, the indebtedness, liability, or obligation of said corporation to itself, in flagrant violation of the provisions of the article of the Constitution just quoted, as part of the organic and fundamental law.

Article 45 of the Constitution of 1879 also provides that: "The General Assembly shall have no power to grant or *to authorize any parish or municipality authority to grant any extra compensation, fee, or allowance* to a public officer, agent, servant, or *contractor*."

The City of New Orleans, conformably with express constitutional enactment, is chartered by the State Legislature. The powers of its agents and officers are carefully defined in the Charter, and can not, under elementary principles, extend beyond the provision of law fixing them. The Legislature is, *totidem verbis*, prohibited by the State Constitution, from granting or from authorizing the municipality to grant any extra compensation or allowance, or to release from its obligation the Water Works Company in its character of contractor. We have, notwithstanding, as has been shown, Act 56 of 1884, and Ordinance No. 909, which attempts to do the very things which are so prohibited; and the judgment of the Supreme Court of Louisiana, herein involved, has actually proceeded to declare the act and ordinance to be valid. The citizens of New Orleans would thus evidently be divested of their rights and property by the force and effect erroneously allowed the act and ordinance without due process of law—for, being *ultra vires*, the act and ordinance are unmistakably NULL AND VOID, and ought to have been so pronounced.*

It will be seen, by reference to exhibit "G," that the City of New Orleans has received special recognition in the Constitution of Louisiana as a legal entity or personality distinct from the State. By Arts. 45 and 57 of the same instrument (see exhibit "G"), the contract rights of the city are in so many words recognized and protected. The rights in question are, therefore, notwithstanding they are those of a political corporation, just as fully entitled to the guarantee of the Constitution of the

United States as any other contract rights are, whether of

* There is a well recognized distinction between the proprietary or private character, and the public character of municipal corporations. Where they act not from considerations of State, but for private advantage, as to the exercise of such powers, and to contracts made with reference thereto, the corporation is to be regarded, *quo ad hoc*, as a private corporation, and, as to its contracts, is within the clause of the National Constitution securing the inviolability thereof. Judge Dillon in his work on *Municipal Corporations*, lays down the law to this effect.

Dillon on Municipal Corporations, Fourth Ed., Vol. I, Sec. 68, and note 1, page 112; Sec. 68*a*, 72, 73.

See also *Cooley on Taxation*, p. 689, note 1, where this twofold nature of municipal corporations is commented upon, and where the decisions upon the subject are arrayed.

In *Bailey* vs. *The Mayor of the City of New York*, 3 Hill 539, the distinction in question, is applied and the City of New York is regarded as a private company, or person, in a decision by Chief Justice Nelson. In *Western Savings Co.* vs. *Philadelphia*, 31 Pa. 183, after alluding to the decision in *Bailey* vs. *The City of New York*, Chief Justice Lewis says: "in that case the acts of the city *had relation to the construction of water works*. In this they have relation to gas works. *But the principle is precisely the same in both cases.*"

"the city was legally entitled to have her water supply, "under the charter, for a price of about $20,000 per "annum, the contract herein involved obliges her to pay "a minimum price of $68,340 per annum for the water "supply stipulated for, being a difference of more than "$2,000,000 for the whole term of the contract. The "first question that inevitably arises under the foregoing "statement is: What is the difference between the water "supply required by the charter and that stipulated in "the Ordinance contract?

"A comparison of the terms of the charter provisions "with those of the Ordinance and contract shows conclu- "sively that there is no substantial difference in the obli- "gations imposed on the company by the respective "instruments—certainly none that could serve as the "slightest support for the enormous excess of price.

"The last appeal of the Company is to Act No. 56 of "the General Assembly of 1884, passed after the decision "rendered by this Court. That act is ambiguous in its "terms, and it is needless to discuss its provisions and its "phraseology.

"It either authorized this contract (of 1884) or it did "not. If it did not, there is an end to its pertinency. If it "did, it clearly violates the following articles of the Con- "stitution, viz.: Article 45, which declares: 'The Gen- "eral Assembly shall have no power to grant or authorize "any parish or municipal authority to grant any extra "compensation, fee or allowance to a public officer, agent, "servant or contractor;' and Article 57, which declares "that 'the General Assembly shall have no power to re- "lease or extinguish, or to authorize the releasing or ex- "tinguishing, in whole or in part, the indebtedness or "liability of any corporation or individual to the State, or to any parish or municipal corporation thereof.

"The applicability of these two articles is too patent

"to need comment. If, under its charter, the Water "Works Company was bound to furnish the water an- "nually for a compensation not exceeding the amount of "its taxes, how could the Legislature authorize the city to "pay such contractor an extra compensation of $45,000 "per annum? And if such was the liability of the Water "Works Company, how could it be released or extin- "guished by substituting therefor a different and vastly "less onerous liability?"

The State of Louisiana is clearly only what the people have ordained and established to be the State by the Constitution. Its capacity to acquire rights, and perhaps even to be subject to some obligations, is settled by the Constitution. That instrument has seen fit to protect the rights of municipalities, and these can not be assailed by the State itself, simply because the Constitution expressly protects them from invasion. Spring Valley Water Works vs. Schottler, 110 U. S. 348.

The people of Louisiana, in convention assembled in 1879, as set forth in the State Constitution of that year, secured to the municipality of New Orleans and the inhabitants thereof all the rights and advantages accruing or to be derived from the contract entered into in 1877 between the State and the New Orleans Water Works Company, defendants in error, for and on behalf of the City of New Orleans.

What the people of the State have done, in the exercise of their sovereign will, can not be undone or set aside by the State Legislature. The people have the right to define and limit the exercise by the Legislature of the police power, as has been held by this Court in New Orleans vs. Houston, 119 U. S. 266. So, too, the people having acted as they did, with reference to State and municipal contracts and contractors, all parties are irrevocably bound.

Here, it is submitted to the Court, is not a question as to whether the State or City, in the exercise of its police power, can or can not disregard or authorize the disregarding of a contract, with the consent of the other contracting party. The true issue is, whether the citizens of the City of New Orleans can be deprived of their property in the contract under consideration, by having the terms of the same impaired by an act of the Legislature or Common Council of New Orleans, which act is *ultra vires*, null and void, as being in direct opposition to a clear, plain and unambiguous provision of the Constitution of the State, securing the citizens in the possession and enjoyment of the contract.

The language of Andrews, Judge, as the organ of the Court of Appeals of New York, in *The People ex rel. The Manhattan Savings Institution of the City of New York, Appellant, vs. Norton P. Otis, Mayor, etc., Respondents*, is of direct application here. Says the Chief Judge:

"Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision." 90 N. Y. 52.

It is submitted, indeed, that the jurisdiction in this Court is evident to pass upon the inviolability of the contract, contained in Act No. 33 of the Acts of the General Assembly of Louisiana of 1877, and the rights of the citizens of New Orleans thereunder; and, further, to review the decision of the Supreme Court of Louisiana, which has the effect of declaring the contract to be abrogated, and of holding to be legal and valid the statutes of the State of Louisiana, and the ordinance of the City of New Orleans, which seek to impair the terms of the contract.

It has now been abundantly shown that the statutes in question are alleged by the City and its citizens to be *ultra vires*, null, void, and of no effect; and contrary to the

Constitution of the United States and Amendment XIV, and to the Constitution of the State of Louisiana.

The Mayor of the City of New Orleans has applied to this Court to have the decision of the Supreme Court of Louisiana reviewed; the City of New Orleans is here for the same purpose; the committee of citizens composed of E. Conery, Jr., *et als.*, are here also. Nevertheless, the Court is asked by the defendants in error to dismiss the appeal of the City, because the judgment of the State Supreme Court is not against the City of New Orleans.

It has been sought to be shown that since the filing of the amended and supplemental answer of the City, the latter and the citizens, in effect, are one and the same party; that the judgment of the Civil District Court in favor of E. Conery, Jr., *et als.*, being in accordance with the prayer of the City in its amended and supplemental answer, was virtually a judgment in its favor; that the City became joint appellee with E. Conery, Jr., *et als.*, when the Water Works Company took the appeal from that judgment to the Supreme Court of Louisiana, and that the judgment of the Supreme Court of Louisiana adjudging the statutes, ordinance and contract involved to be legal, subsisting, valid, and binding, in favor of the Water Works Company, is a judgment adverse and injurious to the City as well as to its co-suitors, E. Conery, Jr., *et als.* This position finds support and recognition in the Supreme Court of Louisiana as well as in Courts of other States.

Handy vs. New Orleans, 39 La. An. 107.
Conery et als. vs. Water Works Company, Ib. 770.
Crampton vs. Zabrinski, 101 U. S. 601.
New London vs. Brainard, 22 Conn. 552.
Baltimore vs. Gill, 31 Md. 379.
97 Ind. 1.
Cooley on Taxation, p. 548.
Dillon on Mun. Corp. 914 to 937, and authorities in notes.

There is no injunction against the Water Works Company. It is now working under its Charter, and derives all the benefits claimed by it under its contract made with the City in pursuance of Ordinance No. 909. It has received every dollar due to it under the terms of that extraordinary contract. All that the City asks under the writ herein is that the Ordinance and contract be annulled; but in the meantime, the City is necessarily controlled by the unjust and illegal terms thereof. It must remain remediless, unless relief is granted to it by this Court.

In further support of the view that the question on which the jurisdiction of this Court depends, the following conclusions are submitted, that:

Act 33 of 1877, known as the charter of the Water Works Company, is binding upon said Company, the State of Louisiana, and the City of New Orleans.

Act 56 of 1884, whereunder the Company seeks to escape from the obligations of the charter, did not authorize Ordinance 909; nor did Act 20 of 1882, the City Charter, authorize said Ordinance No. 909.

If the acts did authorize the passage of the ordinance, then they are unconstitutional, and the ordinance itself, purporting to have been enacted in pursuance of Act 56 of 1884, is *ultra vires*, and in fraud of the rights of the City.

The defendant company was incorporated by Act 33 of 1877 (extra session), the 11th section of which reads as follows, to wit:

"That the City of New Orleans shall be allowed to use "water from the pipes and plugs of said company now "laid, or hereafter to be laid, free of any charge, for the "extinguishment of fires, cleansing of the streets, and for "the use of all public buildings, public markets, and "charitable institutions; and that the said company shall "place, free of any charge whatever, two hydrants of

"the most improved construction, in front of each square "where a main pipe shall be laid, at a suitable distance "from each other, from which a sufficient quantity of "water may be conveniently drawn for the extinguish- "ment of fires, for watering the streets, and cleansing "the gutters, and for any other public purpose; that on "the squares which do not front on the river the hydrants "shall be placed on the opposite sides of the streets, at "an equal distance from each other and the corners. It "shall be the duty of the said company, whenever main "pipes shall be laid, to supply water for all the purposes "herein mentioned at all times during the continuance of "this charter, and in consideration thereof the franchises "and property of said New Orleans Water Works Com- "pany, used in accordance with this act, shall be exempt "from taxation, State, municipal, and parochial."

Sec. 12 confers upon the company the right to use the public streets, and to appropriate private property.

Sec. 13 requires the company, immediately after its organization, to erect "new works and pipes sufficient in "capacity to furnish a full and adequate supply of water, "to be drawn from the Mississippi river or elsewhere, as "may be judged most expedient, that said work * * * "shall be commenced within twelve months * * * "so that within five years from the passage of this act "they shall be completed so as to give an adequate sup- "ply of water to the people of the City of New Orleans," etc.

By Act 43 of 1878 the "adequate supply of water," as provided for by the Act of 1877, is construed to mean a supply at a height of 15 feet wherever the pipes exist, and the exemption from State taxation is withdrawn.

In 1881 the city authorities, conceiving that the exemption from city taxation, as contained in the Water Works Company's charter, was unconstitutional, sued for the tax

of that year claimed to be due upon its property, works, etc.; and the Water Works Company, setting up the exemption in question as a defence to the suit, further claimed that if said exemption was not allowed by the court, then, that the city must pay for its water, since the obligation to furnish for the water was based upon the exemption from taxation, and would cease to exist with the failure or withdrawal of the exemption.

The amount of the tax claimed by the City was $11,-484.87, whilst the value of the water furnished for the year in question was stated to have exceeded $40,000; so that, upon the company's theory, the balance was largely in its favor, and its contract was an onerous one from which it was interested (to the extent of over $28,000 per annum, as matters then stood) in being released. The case was tried in the Civil District Court, and judgment was rendered in favor of the city for the amount of the tax claimed, and in favor of the company for the amount claimed as the value of the water furnished. Upon appeal, however, it was held by the Supreme Court:

1. That the exemption from taxation was unconstitutional, and hence, that the judgment of the court *a qua*, in favor of the city, for the amount of said tax, should be affirmed.

2. That the provisions of the company's charter providing for the free water supply, and for the exemption from taxation, contemplated and intended that the one should be the exact equivalent of the other.

3. That the exemption from taxation was not, however, the sole consideration for the water supply, but that there were other considerations given besides; and, hence, that the withdrawal of the exemption relieved the company of its obligation to furnish water free of charge only *pro tanto;* that is to say, only to the extent of the amount of the tax which might be claimed, to which extent it was held that the City should pay for the water furnished.

*

Such, according to the learned judge who presided in the Civil District Court, and such, there can be no doubt, was the interpretation put upon the eleventh section of the charter of the Water Works Company by the Supreme Court: and the company, clearly together with the city, was bound thereby: but a short time after the rendition of the judgment of the Supreme Court the Legislature adopted Act 56 of the session of 1884. Concerning this act the opinion of Judge Monroe proceeds:

"The main spirit of the act appears to have been to "authorize and require the city, in any case where it ex- "acted taxes from the company, to pay the value of the "water furnished in the year for which the taxes should "be so exacted."

"The fifth section, however, provides that 'nothing in "this act shall be construed as in any manner abridging or "otherwise affecting any of the rights, franchises, and priv-

*In *City of New Orleans* vs. *The New Orleans Water Works Company*, 34 La. Ann., 442, the decision here referred to will be found. Returning to the decision, in his dissenting opinion in the instant case, Justice Fenner, of the Supreme Court of Louisiana, maintains, that it is impossible to formulate any expression of the doctrine of estoppel, by *res judicata*, which does not forever bar the City of New Orleans, The New Orleans Water Works Co., and their privies, from questioning the conclusiveness of the judgment in question, and from ever again agitating the issues therein decided. Justice Fenner cites many authorities in support of his position. T. R. 185.

" tinctly that no interpretation shall be given to it which, " by subjecting it to the dominion of the Constitution, " might endanger the grants contained in it.

" In view of the provisions of Article 57 of the Consti- " tution, however, it appears to me immaterial whether " the act in question is accepted or not, as it would be " equally inoperative in either case." That article reads " as follows, to wit:

" Art. 57. The General Assembly shall have no " power to release or extinguish, or to authorize the re- " leasing or extinguishing, in whole or in part, the in- " debtedness, liability, or obligation of any corporation " or individual to this State, or to any parish or municipal " corporation therein: provided, that heirs of confiscated " property may be released of all taxes due thereon at " the date of its reversion to them."

" From the facts as presented in the case and in the " case reported in the 36 An., it appears that the amount " of water which the company is bound, under its charter, " to furnish to the city far exceeds in value the amount " of taxes which are exacted from it. And yet, under the " decision which has been quoted, the obligation to furnish " the water still subsists, subject only to the qualification " that compensation equal in amount to the taxes exacted " may be claimed, whilst in so far as the water exceeds " such taxes in value it must be furnished free of charge. " It, therefore, follows that in requiring the city to pay " for all the water which it gets (in the event of its de- " manding the tax), and providing specially that unless it " sets apart a sufficient sum to make such payment the " company shall not be compelled to deliver water, as " provided in its charter, the Legislature is releasing or " extinguishing an obligation which has been ascertained " and defined by the Supreme Court of the State, from " the company to the City of New Orleans, within the " meaning of the constitutional prohibition.

"My conclusions upon this point, therefore, are that "the defendant company, declining to accept or refusing "to admit its acceptance of the Act 56 of '84, and failing "to waive the stipulation of Section 5 of said act, suppos- "ing such waiver to be competent, is not entitled to "claim the benefits contemplated by said act: and that "the act in question, if otherwise operative, would "release the company from an obligation of great im- "portance to the City of New Orleans, and, hence, is "violative of Article 57 of the Constitution.

"After the passage of the act, which I have thus re- "ferred to, to wit, in September, 1884, the City Council "passed an ordinance authorizing a contract to be made "between the city and the Water Works Company for "the carrying out of the ideas expressed in said act."

"In fact, the ordinance bears the title, 'An ordinance "to carry out Act No. 56 of the Acts of 1884, providing "for a future water supply from the New Orleans Water "Works Company to and for the City of New Orleans "and certain institutions, and regulating the use of water "and the payment therefor.'"

"And agreeably to its provisions a contract was entered "into whereby the city agreed to pay for all the water to "be furnished by the company during the term of its "charter (say fifty years from 1877), and whereby it was "stipulated that the minimum number of fire plugs for "which payment should be made (at the rate of $60 "each) should be 1139, so that the least that the city "can hope to get off with is over $68,000 per annum, "whilst the actual amount which she may be required to "pay may exceed that sum."

"It would seem sufficient to say that an ordinance and "contract passed and made for the avowed and expressed "purpose of carrying out an unconstitutional Act of the "Legislature could not be given effect. It is said, how-

"ever, that the act in question is wholly immaterial to the "ordinance and contract which were so passed and "made, and that they can stand without the aid of said "act, even though their only declared purpose was to "carry it out."

"Assuming this position to be tenable in the abstract, "it can not be maintained in this particular case, for the "reasons:

"That the purpose and effect of the contract made "between the Water Works Company and the city, "as disclosed not only by the title of the ordinance pur-"suant to which said contract was made, but by the con-"text of said ordinance and said contract, construed in "the light of the facts disclosed upon the trial of the "case, were to carry out said act of the Legislature, with "some conditions of additional stringency as to the City "of New Orleans.

"That the City of New Orleans has no power, whether "directly or indirectly, to give away money collected "from the taxpayers, and the payment of many thou-"sands of dollars per annum for that which the Supreme "Court of the State has decided nothing need be paid, "is in legal contemplation a gift, no matter in what shape "it may be disguised."

Act 56 of 1884 is, it is submitted, violative of the Constitution, for reasons which are additional to those given by the learned judge.

This Act is entitled: "To provide for the supply of water to the City of New Orleans by the New Orleans Water Works Company, in cases of the municipal taxation of said Company; to authorize provision to be made for the payment of water supplied and to be supplied; to provide for obtaining a supply of clear or filtered water by the New Orleans Water Works Company, and to enable the City of New Orleans to contract for the same:

to regulate the payment of taxes imposed on said Company contrary to the exemption given in its charter, and to put into effect Section 11 of Act No. 33 of Acts of 1877, E. S., in instances of refusing or contrary to the exemption therein."

The Act violates Article 29 of the Constitution of 1879, which declares that every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in the title: whereas Sections 1, 2 and 3 of said Act 56 interpret and seek to enforce as one object Section 11 of Act No. 33 of 1877. Section 4 embraces as another and a second object, this, to wit: The authority to the City of New Orleans to contract for a supply of clear and filtered water: and Section 5 embraces as another and a third object, this, to wit: That it preserves and reserves all its rights, franchises and privileges to the Water Works Company. *State vs. Harrison, 11 An. 722; 32 An. 1013.*

Act 56 also violates paragraph 13 of Article 46 of the Constitution. That paragraph declares that the General Assembly shall not pass any local or special law on the following specified objects: * * * Creating corporations, or amending, renewing, extending, or explaining the charters thereof: whereas Sections 1, 2 and 3 of the Act do renew, extend, and explain the charter of the New Orleans Water Works Company.

Finally, Act 56 violates paragraph 14 of the same Article, which paragraph provides that the General Assembly shall not pass any local or special law on the following specified objects, to wit: Granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity: whereas Sections 4 and 5 of the Act do give to the Water Works Company the exclusive privilege to furnish clear and filtered water to the City of New Orleans and the inhabitants thereof.

It was, indeed, as pointed out by Judge Monroe, under pre ext of conforming to Act 56 of '84, that Ordinance 909, C. S., was adopted by the City Administration in September, 1884, and the contract under the Ordinance, consummated before the City Notary, between the Water Works Company and the City of New Orleans. Instead, however, of giving effect to the rights of the City, this Ordinance evidently sought to defeat and frustrate them. It fixed, as has been seen, in point of fact $68,400 per annum as the liability of the City for a supply of water, in violation of the decision of the Supreme Court of the State, and contrary to the finding of the Court, that the charter of the Water Works Company, in consideration of the monopolistic grant of fifty years to supply the inhabitants of New Orleans with water, was bound to do this for the value of the taxes only. Ordinance No. 909 must be memorable, moreover, for having absolutely ignored and for having left out entirely the main object for which Act 56 of 1884 purports to be adopted by the Legislature. The City means here to speak of a supply of clear or filtered water by the Water Works Company for the safety, welfare and comfort of the people. The Ordinance and the contract under it make no mention whatsoever of clear or filtered water, but the startling result is thoroughly established in the record, that the Water Works Company have never supplied, or attempted to supply, any except muddy Mississippi water, and even that only in notoriously inadequate quantity.

It remains to say something to repel the unjust clamor in which the Water Works Company persist in this case. This has been unceasing. Their position is understood to be that the rights of the Company are contractual rights, and that the efforts to overthrow them are tainted with bad faith, because they are those of parties who,

while they make war upon the obligation of contracts in general, seek at the same time to escape from their own, in particular. It will be found on examination that this view has nothing to rest on, except the assumption of the Company who, as interested litigants, indulge themselves in its constant repetition.

It has been abundantly shown that the contract between the Water Works Company and the city, before Joseph D. Taylor, in pursuance of Ordinance No. 909, was, as well as the Ordinance itself, *ultra vires*, and that it is upon elementary law, consequently, null and void. But that is not all. The contract and the ordinance in question have been shown to be in fraud of the supposed enabling Statute No. 56 of the Acts of 1884, and the Statute itself to be unconstitutional. The moral strength and advantage in behalf of the Water Works Company, when they rest their case on these foundations, is in consideration of the character of them, and of the circumstances of the case, not to be appreciated, unless it be by parties like themselves biased by the risk of parting with large profits, such as those which are evidently at stake in its present litigation.

But let that pass. The error in the view taken by the Company of their suit is a still greater one than has been yet pointed out. It reaches further than any other, and is indeed the capital vice of their case, and underlies their presentation of it everywhere. It is meant here to refer to the charge of the company, that the City of New Orleans was bound, under the eleventh section of the Water Works charter, known as Act 33 of 1877, in consideration of the use of water free of charge, to exempt the Company from municipal taxation: and that when, notwithstanding suit was brought to recover the taxes, the City thereby invaded and at last overthrew the sacred obligation of its own contract.

The answer here is an easy and direct one. The City has done no such thing as is charged. So far as Section 11 of Act 33 of 1877 is concerned, there were only two parties thereto: the State of Louisiana of the one part, and the Water Works Company of the other. It was the act of the State and that of the Company, and was in favor of the Company, which procured the passage of it in the ways disclosed by the record. Section 11 in question stipulates, it is true, some advantage in favor of the City of New Orleans. Here is an instance of the *stipulation pour autrui*. A party may in his own name, according to Article 1890 of the Revised Civil Code of Louisiana, make the advantage of a third person the condition or consideration of a commutative contract or onerous donation. If, according to the article, the third person consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked. According to the jurisprudence of the State, the right of the third party in question to sue on the stipulation in his favor is not to be doubted. *Code of Practice, Art.* 35; *Revised Civil Code of Louisiana, Article* 1890 (old number, 1884); 5 *Martin* (*La.*) 322; 2 *New Series*, 672; 3 *New Series*, 607; 4 *New Series*, 527; 6 *New Series*, 152; 5 *Louisiana Reports*, 316; 9 *Robinson Reports*, 19; 5 *Louisiana Annual*, 229; *Hennen's Digest* (*La.*) *p.* 1029. *See also Appendix I.*

The Legislature, which was engaged in bestowing a gigantic and monopolistic privilege on the Water Works Company to supply the people of New Orleans for fifty years with water, might be supposed naturally to have some care for the capital city of the State: and the Water Works Company must just as naturally be held to have made some sort of concession to public opinion in return for all the advantages which it secured to itself. But the Legislature added, in point of fact, nothing to the

numerous privileges of the Company when it conferred on it exemption from municipal taxation.

The Constitution of 1868, then in full force, did not permit this. The Legislature, equally with the other departments of goverment, exercised their functions under the domain of that instrument, and were bound by it. Indeed, the rule that neither municipal authority nor the State Legislature could exempt property from taxation, whether by commutation or in any other way, is settled not only in the Constitution itself, but in a long line of well considered decisions by the Supreme Court of Louisiana. It must be taken for granted that the General Assembly, when it indulged in vain legislation to announce to the world that it had exempted the Water Works Company from municipal taxation, was not wholly ignorant of the Constitution, and certainly it will not do to contend that they were without acquaintance with the decisions of the Supreme Court of the State. It is evident, on the contrary, that they knew perfectly of the constitutional prohibition which prevented property being freed from City taxation, and were well advised that the tribunals of the State had insisted upon observance of it. If, then, the Company took the charter with Section 11 in the same, it was so accepted subject to all disadvantages, as well as with benefit of all the advantages of the situation. What hopes they may have nursed that the Constitution of the State would not actually be enforced and that the Company would thus escape taxation from the municipality were their own. It is not even pretended that the City had anything to do with exciting them, and if they have turned out to be fallacious and delusive, those who conceived them are clearly without right of any kind to complain. The Company, as has been said, were parties to that contract with the State, and although they once resisted the terms thereof, there is a final judgment of the

Supreme Court of Louisiana in which they voluntarily acquiesced by dismissing, on their own motion, in the Supreme Court of the United States, the writ of error originally sued out. The judgment of the Supreme Court of the State referred to and the evidence of acquiescence are to be found of record in case of New Orleans Water Works Company, plaintiffs in error, vs. City of New Orleans, defendants in error—No. 73 on the docket of this Court.

In the recent case of the *Spring Valley Water Works vs. Schottler*, 110 *U. S.*, 348, the legal issue presented is not unlike that of the New Orleans Water Works Company in the instant case, and was dealt with and disposed of by this Court upon principles similar with those here expressed.

In *Spring Valley vs. Schottler*, the general question involved is whether the Water Works Company in California, formed under the Act of 1858 of that State and before the adoption of the Constitution of 1849, had a right to charge their customers such prices for water as may from time to time be fixed by a commission, two selected by the Company, two by the public authorities of the locality, and, if need be, a fifth selected by the other four, or by the sheriff of the county. Afterward, in 1878, the Board of Supervisors of the City and County of San Francisco appointed four commissioners, and those, later on, named a fifth, who met, the Act of '58 to the contrary notwithstanding, and fixed a tariff of rates for the *Spring Valley Water Works*, to go into effect on the 1st of June, '78. The Water Works Company resisted, but there was judgment against them.

Chief Justice Waite, who spoke for the Court, said:

"The Constitution of California adopted in 1849 pro-
"hibited one legislature from bargaining away the power
"of succeeding legislatures to control the administration

"of the affairs of a private corporation formed under the "laws of the State. Of this legislative disability the Spring "Valley Company had notice when it accepted the privi- "leges of the act of 1858, and it must be presumed to "have built its works and expended its moneys in the "hope that neither a succeeding legislature, nor the "people in their collective capacity when framing a con- "stitution, would ever deem it expedient to return to the "old mode of fixing rates, rather than on any point of "power to do so, if found desirable. * * *

"The organization of the Spring Valley Company was "not a business arrangement between the State and the "company as contracting parties, but the creation of a new "corporation to do business within the State, and to be "governed as natural persons or other corporations were "or might be. Neither are the chartered rights acquired "by the company under the law to be looked upon as con- "tracts with the City and County of San Francisco. The "corporation was created by the State. All its powers "came from the State and none from the City or County. "As a corporation it can contract with the City and "County in any way allowed by law, but its powers and "obligations, except those which grow out of contracts "lawfully made, depend alone on the statute under which "it was organized, and such alterations and amendments "thereof as may from time to time be made by proper "authority. The provisions for fixing rates can not be sep- "arated from the remainder of the statute by calling it a "contract. It was a condition attached to the franchises "conferred on any corporation, formed under the statute, "and indissolubly connected with the reserved power of "alteration and repeal."

The point made by the Water Works Company, that there is a failure of joinder of parties in the present appeal, for the reason that the City Comptroller and Treasurers

have not been severally cited, is clearly destitute of merits. The City Charter provides that the City of New Orleans "shall have a seal and may be sued," etc. The Comptroller and Treasurer of the time of the institution of this controversy are *functi officiis*. Their successors have never been nominally parties. The city is the true party in interest, and the corporation and all of its officers are necessarily impleaded when the city is.

In consideration of the foregoing argument and of the authorities supporting it, now and on motion to dismiss heretofore adduced, the judgment of the Supreme Court of Louisiana should be avoided and reversed.

Respectfully submitted.

CARLETON HUNT,

City Attorney of New Orleans, and Attorney for Joseph A. Shakespeare, Mayor of the City.

APPENDIX.

[EXHIBIT A.]

ACT No. 33, E. S. OF 1877.

AN ACT

To enable the City of New Orleans to promote the public health and to afford greater security against fire, by the establishment of a corporation to be called the "New Orleans Water Works Company;" to authorize the said Company to issue bonds for the purpose of extending and improving the said works, and to furnish the inhabitants of New Orleans an adequate supply of pure and wholesome water; to permit the holders of Water Works bonds to convert them into stock, and to provide for the liquidation of the bonded and floating debt of the City of New Orleans.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That a corporation be, and the same is hereby created, to be styled "The New Orleans Water Works Company," the capital stock whereof shall consist of two millions of dollars, which shall be divided into twenty thousand shares of one hundred dollars each.

Sec. 2. *Be it further enacted, etc.*, That immediately after the organization of the said Water Works Company, as hereinafter provided, it shall be required to issue to the City of New Orleans, stock to the amount of six hundred and six thousand six hundred dollars, as full paid, and not subject to assessment; and in addition thereto, one similar share for every one hundred dollars of Water Works bonds which said City may have taken up heretofore and extinguished by payment, exchange or otherwise:

and that the residue of said capital stock shall be reserved for the benefit of all holders of Water Works bonds, to the extent of the amount now outstanding, who may elect to avail themselves of the provisions of this Act: and the said Water Works Company shall issue to the said City of New Orleans, to be exchanged with the holders of said bonds, one share of full paid stock, not subject to assessment, for each and every one hundred dollars of said Water Works bonds; and the said bonds, as fast as surrendered and exchanged for stock as aforesaid, be canceled; that for the purpose of effecting said exchange of outstanding Water Warks bonds for stock, as aforesaid, the City of New Orleans shall be entitled to all the certificates for the shares of said stock of said New Orleans Water Works Company, and shall, by advertisement for six months in two newspapers in the City of New Orleans, and two newspapers in the City of New York, give notice that it will exchange said stock at par for said Water Works bonds at par, exclusive of the overdue coupons attached to said bonds, which shall constitute a separate demand against said city; and in case any of the said bondholders shall fail or refuse to avail themselves of this Act within one year from the formation of said company, the said City of New Orleans shall not thereafter be required to make said exchange, but may retain the unused shares of stock for its own account and benefit, unless it shall prefer to continue to take up any of said outstanding bonds by exchange as aforesaid.

Sec. 3. *Be it further enacted, etc.*, That the said Water Works Company shall be organized by the Mayor of the City giving thirty days' notice that he will receive subscriptions of bondholders who may agree to exchange their bonds for stock as aforesaid; and the said City shall at once subscribe for stock to the amount of six hundred and six thousand six hundred dollars, and such further amount

as shall equal the par value of any of said Water Works bonds, which shall have been extinguished by said City: and as soon as in addition to the subscription of said City there shall be subscribers for an exchange of said bonds for stock to the extent of five hundred thousand dollars, and the said amount of bonds shall have been actually surrendered to and canceled by the Administrator of Finance, the said subscribers shall assemble together, on a day to be named by the Mayor, and shall elect a board of directors, to consist of seven persons, four of whom shall be designated by the Mayor, and the remaining three shall be elected by said subscribers, other than said city, from amongst themselves: and the persons thus designated and elected shall constitute the first board of directors, and shall continue in office until the first of July, eighteen hundred and seventy-eight, and the said board shall elect one of their number as president.

Sec. 4. *Be it further enacted, etc.*, That as soon after the election of said board of directors as the City Council may determine, the Mayor of the city shall transfer, by notarial act, to said New Orleans Water Works Company the water works and all the property appurtenant thereto.

Sec. 5. *Be it further enacted, etc.*, That the said Water Works Company shall own and possess the privileges acquired by the City of New Orleans from the Commercial Bank; that it shall have for fifty years from the passage of this Act the exclusive privilege of supplying the City of New Orleans and its inhabitants with water from the Mississippi river, or any other stream or river, by means of pipes and conduits, and for erecting and constructing any necessary works, or engines, or machines for that purpose: that it may contract for, purchase or lease any land or lots of ground, or the right to pass over and enter the same from time to time as occasion may require, through which it may be necessary to convey the water

into said city, or to distribute the same to the inhabitants of said city; and to construct, dig, or cause to be opened, any canals or trenches whatsoever, for the conducting of the water of the rivers from any place or places it may deem fit, and to raise and construct such dykes, mounds, reservoirs, as may be required for securing and carrying a full supply of pure water to said city and its inhabitants; to enter upon and survey such lands as it may think proper, in order to ascertain the best mode of furnishing a supply of water; to lay and place any number of conduits, or pipes, or aqueducts, and to cleanse and repair the same, through or over any of the lands or streets of the city of New Orleans; *provided*, the same shall not be an obstruction to commerce or free circulation; and also to have and use a common seal and alter the same at pleasure; to ordain and establish by-laws for its government and that of its officers and employees, not repugnant to this Act and the Constitution of the State and of the United States, or the ordinances of the city of New Orleans.

Sec. 6. *Be it further enacted, etc.*, That on the first Monday of July, eighteen hundred and seventy-eight, and annually thereafter, an election for directors of said Company, after ten days' notice of the time and place of holding the same, shall be held, at which election there shall be elected four directors by all the stockholders other than the city of New Orleans, and the Mayor of the city, the Administrator of Water Works and Public Buildings, and the Administrator of Finance of said city, shall be *ex-officio* directors of said company; the said city, through its Mayor and Administrators, shall have the right to vote at the election of directors, and at all meetings of said stockholders in the same manner as any other stockholders. That at all elections and all meetings of stockholders each share of stock shall be entitled to one vote. The directors elected shall serve for one year, and shall hold their offices

until their successors are appointed; and no failure to elect directors at the time designated shall prevent the board of directors from fixing another day for holding the election; and in case of vacancy in the board of directors occasioned by death, resignation, or absence from the State or other cause, the board of directors may fill such vacancy for the remainder of the year.

Sec. 7. *Be it further enacted, etc.*, That the stock owned by said city of New Orleans in said Water Works Company shall not be liable to seizure for the debts of said city.

Sec. 8. *Be it further enacted, etc.*, That the stock of said Water Works Company may be increased to two millions of dollars, for the purpose of enabling said company to improve, enlarge, and extend its works: *provided*, that the new or increased stock shall be paid for in cash, or in work done for the company; and in case of non-payment of instalments on stock subscribed for, the same may be forfeited to the use of said company.

Sec. 9 *Be it further enacted, etc.*, That the board of directors of said company shall have power, in addition to the authority to increase its capital stock, to borrow money for the purpose of improving and enlarging its works, and increasing the supply of pure water; and to accomplish this purpose the said board of directors are hereby authorized to issue the bonds of the company to an amount not exceeding two millions of dollars, and in such sums, on such terms, and bearing such rate of interest, as said board may determine, and the payment of said bonds, in principal and interest, may be secured by a mortgage of all the property and franchises of said company, including its franchise to be a corporation, and said mortgage may include the property and franchises of said company, acquired or to be acquired, and the registration of said mortgage in the office of the Recorder of Mortgages for the

Parish of Orleans shall operate on the property and franchises of said company, wheresoever situated, and shall be and continue a valid and subsisting mortgage until the payment of the debt secured by it, without reinscription; *provided, however*, that no bond shall be issued, or mortgages given, without the consent of the Council of the city of New Orleans, and said bond shall not be sold or disposed of except on such terms as shall be approved by said council of said city.

Sec. 10. *Be it further enacted, etc.*, That said company shall not declare or pay any dividends except in cash, and then only out of the next semi-annual or annual receipts, after payment of expenses of operation, and the interest on its bonded debt, nor shall any dividends be declared until the contemplated works are completed and in use.

Sec. 11. *Be it further enacted, etc.*, That the city of New Orleans shall be allowed to use water from the pipes and plugs of said company now laid, or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets, and charitable institutions, and that the said company shall place, free of any charge whatever, two hydrants of the most approved construction in front of each square, where a main pipe shall be laid at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets, and cleansing the gutters, and for any other public purposes; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners. It shall be the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter; and in consideration thereof the franchises and property of said

New Orleans Water Works Company, used in accordance with this Act, shall be exempt from taxation—State, municipal and parochial.

Sec. 12. *Be it further enacted, etc.*, That the said Water Works Company shall have the right, in the city of New Orleans and its suburbs and adjoining lands, to use the streets and public places for the purpose of laying pipes and hydrants to run water: *provided*, that said streets shall not be obstructed longer than necessary for such purpose, or for making repairs, and that said streets shall be restored to the same condition they were in as soon as practicable, by the said company, under the supervision of the City Surveyor. In case the said Water Works Company shall require any lot of ground in the city of New Orleans, or any lot of ground or quantity of land situated in any parish of this State, for the purpose of constructing reservoirs or other works, or for the purpose of laying pipes to conduct water to the city of New Orleans, and shall not be able to agree with the proprietor or proprietors of said lot of ground or land, the said company shall have power to cause the same to be expropriated in pursuance of the general laws on the subject of expropriation for works of public utility now in force, or which may hereafter be enacted, and if the object of said company be merely to lay pipes through a piece of land or lot of ground, the expropriation shall be confined merely to the servitude it may require, and not to the right of absolute ownership.

Sec. 13. *Be it further enacted, etc.*, That the said Water Works Company, immediately after its organization, shall proceed to the erection of new works and pipes sufficient in capacity to furnish a full and adequate supply of water, to be drawn from the Mississippi river, or elsewhere, as may be judged most expedient: that said new works and pipes shall be commenced within twelve months from the passage of this Act, and shall be

year by year completed, so that, within five years from the date of this Act, they shall be completed so as to give an adequate supply of water to the people of the city of New Orleans, exclusive of the Fifth District. If said work be not done as above prescribed, said corporation shall forfeit all exclusive privileges granted herein, and the city shall have a right to contract with any one else for a supply of water as above provided, and to expropriate the property of the corporation hereby created. After the completion of the new works and pipes, the said company shall, from time to time, as the wants of the population may require, and when the estimated revenue on the cost of such extension shall equal ten per centum, extend their works throughout the entire limits of the city and suburbs, and any future extension of said city; and any failure by said Water Works Company to comply with this provision shall work a forfeiture of this charter.

Sec. 14. *Be it further enacted, etc.*, That the city of New Orleans, through it council, shall have authority to apply the stock subscribed for by said city, as herein provided, to the reduction of the bonded or floating debt of the said city, on such terms of adjustment as may be mutually agreed upon between the City Council and the holders of such bonded or floating debt; *provided*, said stock shall not be sold at less than par, and that when sold for obligations of the city, it shall only be under sealed proposals, after not less than fifteen days' advertisement in two daily papers, to the bidder who shall offer said obligations at the most advantageous rate, the council reserving the right to reject any and all bids.

Sec. 15. *Be it further enacted, etc.*, That the said Water Works Company shall have the right to fix the rates of charges for water; *provided*, that the net profits of the company shall not exceed ten per cent. per annum, and shall publish sworn annual statements of its business

and condition; and that the City Council shall have the power to appoint a committee, of not less than five, who shall have access to the books of the said company, and make such extracts from the same as they may deem necessary, and in case the said profit shall exceed ten per cent., the City Council shall have the right to require said company to reduce the price of water in such manner, and in such a proportion, that the profits shall never exceed the above named rates: *and provided further*, that the rates charged shall never exceed those now paid by the city, and in case said company shall refuse compliance, the demand of said city may be enforced by a writ of mandamus.

Sec. 16. *Be it further enacted, etc.*, That if any person or persons shall obstruct the said company, their successors, agents, workmen, or servants, in conveying the said water into the said city and its suburbs, or shall change, alter, remove, injure, or destroy any work or part of a work made by the said company, or cause to be made, for the purpose of introducing water into the city of New Orleans, under the authority of this act; or if any person shall alter, change, or pollute the water or stream which the said company shall hereafter introduce, or be preparing to introduce, such person or persons shall be indicted in the proper court for the trial of such offence, and being thereof convicted, shall be fined at the discretion of the court according to the nature of the offence, and imprisonment for a term of not exceeding ten years, such fine to be paid and applied to the use of said company.

Sec. 17. *Be it further enacted, etc.*, That until other works are constructed by which the present works may be dispensed with, the same shall remain under the control of the City Council, and the superintendence thereof remain in the hands of the Administrator of Water Works and Public Buildings: but the said company shall be

authorized to collect the revenues thereof and apply them to the expense of operating and extending the works. At the expiration of fifty years from the organization of the company, the city shall have a right to buy the works, conduits, pipes, etc., of the company, at a valuation to be fixed by five experts; two to be named by the city, two by the company, and the four to select the fifth expert; but should the city neglect or refuse to purchase said works, etc., as above provided, the charter of the company shall be *ipso facto* extended for fifty years longer, but without any exclusive privilege or right to supply water, according to the provisions of the charter.

Sec. 18. *Be it further enacted, etc.*, That nothing in this Act shall be so construed as to prevent the City Council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river exclusively for his own or their own use.

(Signed) LOUIS BUSH,
Speaker of the House of Representatives.

(Signed) LOUIS A. WILTZ,
Lieutenant Governor and President of the Senate.

Approved March 31, 1877.

(Signed) FRANCIS T. NICHOLLS,
Governor of the State of Louisiana.

A true copy: WILL A. STRONG,
Secretary of State.

[EXHIBIT B.]

No. 56] AN ACT

To provide for the supply of water to the City of New Orleans, by the New Orleans Water Works Company, in cases of the municipal taxation of said Company; to authorize provision to be made for the payment of water supplied and to be supplied; to provide for obtaining a supply of clear or filtered water by the New Orleans Water Works Company, and to enable the City of New Orleans to contract for the same; to regulate the payment of taxes imposed on said Company contrary to the exemption given in its charter and to put into effect Section 11 of Act No. 33 of Acts of 1877, E. S., in instances of refusing or contrary to the exemption therein.

Whereas, Due notice and advertisement has been given and made of the intention to apply for this Act pursuant to Article 48 of the Constitution of this State; and

Whereas, The New Orleans Water Works Company is being subjected to municipal taxation notwithstanding the exemption from taxation granted by its charter in consideration of water to be supplied to the City of New Orleans; and

Whereas, It is possible and desirable to furnish the inhabitants of New Orleans with clear or filtered water from the Mississippi river; therefore,

Section 1. *Be it enacted by the General Assembly of the State of Louisiana*, That in all instances of the taxation of the franchises or property of the New Orleans Water Works Company for any year or years by or for the City of New Orleans, or for municipal purposes, whether

such taxation be for past or future years, and the said Company be in any manner obliged to pay, notwithstanding the exemption granted in Section 11 of Act No. 33 of Acts of 1877, E. S., then, in all such instances, the said City of New Orleans is hereby empowered and required to pay the said Company the value of all the water the said Company has supplied or shall supply during any year or years for which said taxes have been or shall be levied, to or for the use and purposes of the City of New Orleans, its public buildings, markets, or for streets, gutters, extinguishment of fires or other public purposes.

Sec. 2. *Be it further enacted, etc.*, That in all instances of such taxation, contrary to said exemption, or any future year or years, the City of New Orleans shall provide in its budget, or shall set apart and appropriate a sum sufficient to pay for the said water supply for said year or years; and unless this be observed and done, the said Company shall not be compelled to deliver water for the uses and purposes aforesaid.

Sec. 3. *Be it further enacted, etc.*, That any taxes already imposed for any year, contrary to said exemptions, shall not be exacted, nor any penalty or interest accrued be demanded thereon, or any begin to run until said City shall have provided for the payment of the water supplied in said year, or provision made therefor by remedy at law or equity.

Sec. 4. *Be it further enacted, etc.*, That to secure the inhabitants of New Orleans and to the use of the City a supply of filtered or clear water, the City of New Orleans be and is hereby empowered to contract with the said Company, and determine upon terms and conditions, and a price for obtaining from said Company such supply clear or filtered water.

Sec. 5. *Be it further enacted, etc.*, That nothing in h act shall be construed as in any manner abridging or

otherwise affecting any of the rights, franchises and privileges heretofore granted to said Company: but all such rights, franchises and privileges shall continue and belong to said Company.

Sec. 6. *Be it further enacted, etc.*, That all laws or parts of laws inconsistent herewith be and are hereby repealed, and this act shall have effect from and after its promulgation.

H. W. OGDEN,
Speaker of the House of Representatives.

CLAY KNOBLOCH,
Lieutenant Governor and President of the Senate.

Approved 7th July, 1884.

S. D. McENERY,
Governor of the State of Louisiana.

A true copy from the original:
OSCAR ARROYO,
Secretary of State.

[EXHIBIT C.]

OFFICIAL.

MAYORALTY OF NEW ORLEANS,
City Hall, Sept. 25, 1884.

No. 909—Council Series.

AN ORDINANCE to carry out Act No. 56 of the Acts of 1884, providing for a future water supply from the New Orleans Water Works Company to and for the City of New Orleans and certain institutions, and regulating the use of water and the payment therefor.

Whereas, The City of New Orleans has been, and is, and will be, unable to allow the New Orleans Water Works Company the fifty years exemption from taxation, being the consideration for a free supply of water, contemplated by Section 11 of Act No. 33 of the Acts of 1877: and the Courts having decided that the exemption from municipal taxation granted in said Act is not and shall not be enjoyed, and, therefore, as is also decided, that the City must pay for the water supplied by said Company, and

Whereas, It is best to arrange for a fixed annual price for said water supply, rather than leave the City liable to an annual demand, the amount of which can not be known in advance, and from which the City can not be relieved, but is specially authorized and required to provide for the payment therefor, and

Whereas, The said New Orleans Water Works Company is willing to accept terms, arranging for a sum to be determined in advance of each year, and which amount can be readily and equitably fixed, according to a mode adopted in other cities, by reference to the number of fire

hydrants, fire plugs, or fire wells, now numbering eleven hundred and thirty-nine (1139) in this City; therefore,

Section 1. Be it ordained by the City Council of the City of New Orleans, That during the term of the Charter of the New Orleans Water Works Company, beginning with the year 1885, the supply of water for which this Ordinance provides shall be furnished by the said Company, from the pipes and plugs of said Company, now laid or hereafter to be laid, for the following purposes, to wit: For the extinguishment of fires and cleansing of the gutters; for the use of all existing public buildings, public markets, public squares or parks, public schools, and the public charitable institutions supported and to be established and supported by the state and city and now supplied by the said company, and it shall be the duty of said company to keep and maintain a head or pressure of water of not less than fifty feet head, between the hours of 7 A. M. and 6 P. M.; and the reservoir supply at night and between these hours shall be of such abundance as amply to cover the needs of the fire department for extinguishing fires; and said Company shall make such provision as may be necessary to reinforce or supplement said reservoir supply in case of need or accident. In consideration for said supply, the City of New Orleans shall pay, during the term of said Company's Charter to the said New Orleans Water Works Company sixty dollars ($60) per annum for each and every fire plug, fire hydrant, and fire well connected with the mains or pipes of said Company, of which said fire plugs, fire hydrants, and fire wells there are now eleven hundred and thirty-nine (1139), which number shall ever be the least measure of the annual sum to be paid to said company, and for every additional hydrant, fire plug, or fire well exceeding said number, hereafter attached to said pipes or mains, the city shall pay an additional sixty dollars ($60) per annum.

Sec. 2. Be it further ordained, That the City of New Orleans shall have the power in times of drought to furnish water to such persons as may live outside the lines the pipes of said Water Works Company, free from all charges, by the same, and shall have further power by Ordinance duly passed and notified in writing to said Company, before each annual appropriation for said supply, to decrease or increase number of fire plugs, fire hydrants, and fire wells for the ensuing year, all such Ordinances to designate the locations for the new attachments or intended cut-offs; provided, however, that the number of said fire hydrants, fire plugs, and fire wells be not reduced below eleven hundred and thirty-nine (1139), the intent thereof being that the annual price to be paid for said water supply shall never be less than as fixed herein, by reference to the now existing number of said fire plugs, fire hydrants, and fire wells, but the City expressly reserves the power to change the location of any and all of said plugs, hydrants, or wells, whenever the Council shall deem it necessary, said change to be at the cost of the Company.

Sec. 3. Be it further ordained, etc., That the City of New Orleans shall annually set apart, appropriate, and provide in its annual budgets of expenditures and receipts, beginning with those for the year 1885, and in all successive budgets for each year successively, a sum sufficient to pay for said annual water supply, as fixed in the foregoing sections of this Ordinance; and that said annual sum or price shall be paid to said New Orleans Water Works Company in twelve equal and monthly instalments, one on the last day of each consecutive month, beginning in the month of January, 1885, for the year 1885; and beginning also in the month of January in each year thereafter; and in event of prompt cash payments of said instalments during each year, the City of New Orleans shall be entitled to deduct and retain from the last instalment in each

year 6 per cent. of the entire amount paid and payable to the said Company in and for said year: but should any instalment be unpaid when due, it shall bear interest at the rate of 8 per centum per annum, from the end of the month in which it was payable, until finally paid.

Sec. 4. Be it further ordained, etc., That it is hereby made the duty of the Comptroller or Auditing Officer, and of the Treasurer of said City of New Orleans, carefully to set apart and keep, as a distinct fund, the moneys or collections which shall have been appropriated in each year, pursuant to this Ordinance, and such proportion of all collections of the revenue as shall have been appropriated in the budgets to and for said Company, or the said water supply for each year, shall be carefully and exactly set apart by said officers, as collected; and shall be warranted for by said Comptroller and paid by said Treasurer to said Company, during each month, without further direction, ordinance, or authority than that hereby given.

Sec. 5. Be it further ordained, etc., That the New Orleans Water Works Company shall have the right to inspect and examine into the use of water to be supplied, under this Ordinance, and the City of New Orleans and its officers shall see that no water is taken or used except for the purpose aforesaid, and that there shall be no waste nor more water taken and used than may be actually necessary for the purposes aforesaid; and to this end the City of New Orleans shall adopt all proper measures or ordinances to prevent waste and to prevent any use of water except for the purposes herein designated; and it is hereby made the duty of the officers of said City and of those of any and all public buildings, and public institutions, and of all persons using water under this Ordinance, to prevent waste and to prevent the use of such water except for the actual need for the purposes aforesaid.

Sec. 6. Be it further ordained, etc., That the Mayor be

and is hereby authorized and directed to execute a contract by Notarial Act to and with said Company, embodying and carrying out the provisions of this Ordinance.

Sec. 7. Be it further ordained, etc., That all ordinances or parts of ordinances inconsistent or in conflict with this Ordinance be and the same are hereby repealed.

Adopted by the Council of the City of New Orleans. Sept. 23, 1884.

M. McNAMARA,
Clerk of Council.

Approved Sept. 26, 1884.

J. V. GUILLOTTE,
Mayor.

A true copy:

TH. BUISSON,
Secretary to the Mayor.

[EXHIBIT D.]

CONTRACT UNDER ORDINANCE No. 909.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
PARISH OF ORLEANS, CITY OF NEW ORLEANS.

Be it Known:

That on this third day of the month of October, in the year of our Lord one thousand eight hundred and eighty-four and of the independence of the United States of America the one hundred and ninth, before me, Joseph Dewey Taylor, a notary public in and for the Parish of Orleans, State of Louisiana, duly commissioned and qualified, and Official Notary of the City of New Orleans, and in the presence of the witnesses hereinafter named and undersigned—personally came and appeared:

The Honorable Joseph Valsin Guillotte, Mayor of the City of New Orleans, herein acting in his official capacity as Mayor aforesaid, being herein and hereunto specially authorized and empowered by Ordinance Number 909, Council Series, adopted by the Council of the City of New Orleans, on the 23d day of September, A. D. 1884, a duly certified copy of which Ordinance is hereto annexed and made part hereof.

Also came and appeared Mr. Albert Baldwin, President of and herein representing the New Orleans Water Works Company, being herein and hereunto specially authorized and empowered by a resolution of the Board of Directors of said Water Works Company, passed at a meeting of said Board held in the City of New Orleans on the 27th day of September, A. D. 1884, a certified copy of which resolution is hereto annexed and made part hereof.

Whereupon said Albert Baldwin, in his said capacity as President, declared and does hereby declare that he accepts all and singular the terms, conditions, provisions, obligations, rights, benefits and advantages set forth and contained in said Ordinance No. 909, adopted by the Council of the City of New Orleans, on the 23d day of September, A. D. 1884, and approved by the Mayor on the 26th day of September, A. D. 1884, thereupon duly promulgated, and which said ordinance, so accepted by said Baldwin, President, is in the words and figures following, to wit: (Here follows Ordinance No. 909, C. S. See Exhibit "C.")

And said Joseph Valsin Guillotte, Mayor, and said Albert Baldwin, President, having each read and declared himself fully cognizant of the contents of said Ordinance, do severally declare that they do hereby contract, engage, and agree, one with the other, according to the terms, provisions, conditions and language of said Ordinance; all and singular of which said terms, conditions, provisions and language shall be and is hereby made a contract, engagement and agreement between said parties, the City of New Orleans and the New Orleans Water Works Company; to be observed and carried out and held and maintained inviolate during the entire term and existence of the said New Orleans Water Works Company, its assigns or successors, as now fixed in the Charter of said Company, being a period of fifty years from the incorporation of said Company.

The said Albert Baldwin, as President aforesaid, engages to furnish and supply water from the pipes of said Company in the manner, at the times and for all purposes and objects as set forth in and pursuant to the provisions and requirements of the said Ordinance No. 909, Council Series; to furnish or supply water to and for the public places, buildings and institutions as in and by said Ordi-

nance required; to allow the City of New Orleans in time of drought, said state or condition of drought to be decided by the Board of this Company and the City Council, to furnish water to such persons as may live outside the lines of the pipes of the said Company for the needs of said persons, without waste, and by such means of transportation by carts, wagons, barrels, or like appliances, as said City may provide and furnish, all pursuant to the intent and purpose of sections second and fifth of said Ordinance; to observe and obey any ordinance duly notified to said Company directing the increase of the number of fire plugs, fire hydrants and fire wells, or the decrease thereof, provided said decrease be not below eleven hundred and thirty-nine (1139) in number, all according to section third of said Ordinance, and further he engages and contracts, as President aforesaid, to do, perform, and give and to observe, carry out and fulfil all things required of said Company by or in said ordinance.

In consideration whereof said Joseph Valsin Guillotte, Mayor, aforesaid, engages and contracts to pay unto said Company annually the sum of sixty ($60) dollars, for each and every fire plug, fire hydrant and fire well connected with the mains or pipes of said Company, of which there are now eleven hundred and thirty-nine (1139), and which number shall ever be the least measure of the annual sum to be paid said Company; to pay said Company annually sixty ($60) dollars for every additional hydrant, fire well or fire plug exceeding said number of eleven hundred and thirty-nine (1139) and hereafter attached to said mains or pipes; to notify said Company in writing of all decrease or increase required of said plugs, hydrants or wells, to make promptly, fully and specially the annual appropriations and monthly payments as required by and in section three of said ordinance, the City to deduct or retain from the last monthly payment in each year six per centum of

each annual sum paid, and to be paid said Company as provided in said section three; to hold and set apart and keep as a distinct fund, the moneys or collections as required by said ordinance, and upon request or demand of said Company, on the last day of each month in any year the Comptroller of the City shall warrant on the Treasurer for, and the Treasurer shall pay from said money or collections, the instalments which at that time shall be due, without other authority or ordinance than said ordinance; and the Comptroller or Auditing Officer and the Treasurer of the City shall faithfully carry out and promptly obey all the requirements and provisions of the fourth section of said ordinance, and shall raise no obstacle nor impose any delay in obeying the same; and it shall be the duty of each, in his respective department, to keep all money and collections appropriated under said ordinance and this contract, as separate from all other moneys and as a distinct fund, all pursuant to and in accordance with said section four.

The said Company shall have the right to inspect and to examine into and concerning the use of water supplied by it, and none of said water shall be wasted or used otherwise than for the purposes named in said ordinance and to the extent of the actual need for said purposes, all as provided in section five of said ordinance, and to this end the officers and persons designated in said section five, and the City of New Orleans, shall do, perform, and abstain from doing the things set forth in said section five of said ordinance.

Further it is agreed and understood and stated by and between the said parties that the specifications or detailing in this instrument of the several rights, duties, obligations and things to be done, performed, observed, carried out, or abstain from, respectively, does not and shall not limit, modify or in any manner take from the effect of any of

the terms, conditions, provisions or expressions of said ordinance, all of which are by these presents accepted and made binding, effective and operative upon and between the said New Orleans Water Works Company and the City of New Orleans, their assigns or successors, for and during the term named in the Charter of said Company.

Thus done and passed in my office in the City of New Orleans, aforesaid, the day, month, and year first aforesaid, in the presence of Charles G. Rebentisch and George B. Goetz, witnesses, residing in this Parish, who have signed their names with the said parties and me Notary.

Original signed:

J. V. GUILLOTTE,
Mayor.

ALBERT BALDWIN,
President of the New Orleans Water Works Company.

C. G. REBENTISCH,
GEORGE B. GOETZ,
J. D. TAYLOR,
Notary Public.

A true copy of the original.
New Orleans, May 10, 1888.

J. D. TAYLOR,
Notary Public.

[EXHIBIT E.]

MAYORALTY OF NEW ORLEANS,
City Hall, Oct. 27, 1888.

No. 3287—Council Series.

An Ordinance directing the City Attorney to amend pleadings filed in the Civil District Court, Parish of Orleans, on behalf of the City in case No. 15,744 of the docket of the Court, and entitled "Edward Conery, Jr., and others vs. The New Orleans Water Works Company, the City of New Orleans and others," and also directing him to join in plaintiffs' demand to annul the alleged contract of the City of New Orleans, under Ordinance 909, C. S., with the Water Works Company, as beyond the powers of the late City administration, and in fraud of the rights of the City; and further directing the City Attorney to proceedin said suit for the best interests of the City of New Orleans.

Section 1. Be it ordained by the City Council of New Orleans, that the City Attorney, on behalf of the City, at present a defendant of Record in suit 15,774, of the Civil District Court, entitled "Edward Conery, Jr., *et al.* vs. The New Orleans Water Works Company *et al.*," be and he is hereby directed to amend, with leave of the Honorable the Civil District Court, for the Parish of Orleans, the answer of the city therein, and to join in plaintiffs' demand, and to proceed in order to cause to be vacated the alleged contract under Ordinance 909, C. S., between the City and the New Orleans Water Works Company, of date Oct. 3, 1884, before J. D. Taylor, notary, and to have the same pronounced null and void, and of no effect, as being detrimental to the public rights and interest, beyond the powers of the late city administration, and in fraud of the rights of the city.

Sec. 2. Be it further enacted, etc., That the City Attorney be and he is hereby authorized to take such further action in pursuance of this ordinance, relative to said cause No. 15,774, and entitled "Edward Conery, Jr., and others vs. the New Orleans Water Works Company, the City of New Orleans and others," as he may deem necessary for the best interests of the City.

Sec. 3. Be it further ordained, etc., That all ordinances or parts of ordinances inconsistent with or contrary to the provisions of this ordinance be and the same are hereby repealed.

Adopted by the Council of the City of New Orleans, Oct. 23, 1888.

ED. T. MANNING,
Clerk of Council.

Approved Oct. 26, 1888.

A true copy: JOS. A. SHAKESPEARE,
WRIGHT SCHAUMBURG, Mayor.
Secretary to the Mayor.

[EXHIBIT F.]

Extracts from the Constitution of Louisiana of 1879.

Article 253. The citizens of the City of New Orleans, or any political corporation which may be created within its limits, shall have the right of appointing the several public officers necessary for the administration of the police of said City, pursuant to the mode of election which shall be provided by the General Assembly.

Art. 254. The General Assembly, at its next session after the adoption of this Constitution, shall enact such legislation as may be proper to liquidate the indebtedness of the City of New Orleans and apply its assets to the satisfaction thereof. It shall have authority to cancel the Charter of said City, and remit its inhabitants to another form of government if necessary. In any such new form of government no salary shall exceed $3500.

Art. 255. The General Assembly shall pass necessary laws to prevent sailors or others of the crew of foreign vessels from working on the wharves and levees of the City of New Orleans; provided, there is no treaty between the United States and foreign powers to the contrary.

Art. 57. The General Assembly shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this State, or to any parish or municipal corporation therein; provided, the heirs to confiscated property may be released of all taxes due thereon at the date of its reversion to them.

Art. 45. The General Assembly shall have no power

to grant, or to authorize any parish or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, nor pay, nor authorize the payment, of any claim against the State, or any parish or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void.

[EXHIBIT G.]

EXTRACT FROM ACT NO. 20 OF THE ACTS OF 1882.
[Being the Present City Charter of New Orleans.]

Sec. 7. The Council shall have power, and it shall be their duty, to pass such ordinances and to see to their faithful execution as may be necessary and proper: (1) To preserve the peace and good order of the city. (2) To maintain its cleanliness and health, and to this end: (*a*) to adopt and provide an efficient system of drainage; (*b*) to provide for the inspection and cleanliness of all vaults, privies, yards, pools, markets, cemeteries; (*c*) to regulate the location of and inspection and cleansing of dairies, stables, cattle yards, landings and pens, slaughter houses, soap, glue, tallow, and leather factories, depositories for hides, and all places of business likely to be or become detrimental to health, and to adopt such ordinances and regulations as shall be necessary or expedient for the protection of health, and to prevent the spread of disease, and to maintain a good sanitary condition in the streets, public places, and buildings, and on all private premises. The Common Council shall provide for the frequent inspection of all premises by persons to be designated, either by the Common Council or by the Board of Health in the city; they shall also prescribe what water supply shall be provided by the owners of private premises, and that all premises, yards, streets and alleys shall be kept in a cleanly condition; shall provide for the punishment of any violation of such ordinances or regulation, by fine or imprisonment or both; and all such fines, when recovered, shall be paid over to the Board of Health, to assist in its maintenance; (*d*) to suppress all nuisances; (*e*) to prevent the

sale of adulterated or decayed food, and punish the same; to punish the sale of adulterated drinks. (3) To open and keep open and free from obstruction all streets, public squares, wharves, landings, lake shore and river and canal banks. (4) To keep the street and crossings, and bridges, and canals and ditches, clean and in repair. (5) To organize and provide an efficient police. (6) To light the streets, wharves, landings and public squares. (7) To organize and maintain free public schools. (8) To provide for the extinguishing of fires. (9) To maintain levees, dykes, and to protect the city from overflow.

[EXHIBIT H.]

No. 9007.

EXTRACT FROM 34TH ANNUAL REPORTS, P. 432.

CITY OF NEW ORLEANS VS. THE NEW ORLEANS WATER WORKS COMPANY.

The exemption from taxation of defendant's property by its Charter, passed in 1877, is unconstitutional, and the City's demand for taxes is sustained.

To the extent that the exemption was the consideration of defendant's obligation to supply free water to the City, defendant is entitled to relief.

The exemption was not the sole, but only part of the consideration of the obligation to supply free water.

This partial failure of consideration entitles defendant to relief to the precise extent thereof, which is accomplished by condemning the City to pay for its water to the value of the taxes recovered.

Appeal from the Civil District Court for the Parish of Orleans. *Monroe, J.*

Chas. F. Buck, City Attorney, and *Wynne Rogers* for plaintiff and appellant.

Albert Voorhies, Thomas J. Semmes, Henry B. Kelly, Blanc & Butler, and *Breaux & Hall, contra.*

The opinion of the Court was delivered by

FENNER, J. The Act of the General Assembly, No. 33 of 1877, is the charter of the defendant company, and is entitled "An Act *to enable the City of New Orleans*

to promote the public health and to afford greater security against fire, by the establishment of a corporation to be called the New Orleans Water Works Company," etc.

The act provides for the transfer from the City of New Orleans to the company of "the water works and all the property appurtenant thereto," then belonging to said city.

It confers upon the defendant sundry valuable privileges, amongst others, "*that it shall have for fifty years the exclusive privilege of supplying the City of New Orleans and its inhabitants with water from the Mississippi river, or any other stream or river, by means of pipes and conduits*," *etc., and to charge therefor.*

The eleventh section of the Act, which is directly responsive to the purpose declared in the title, provides:

"That the City of New Orleans shall be allowed to use water from the pipes and plugs of said company now laid, or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets, and charitable institutions, and that the said company shall place, free of any charge whatever, two hydrants of the most approved construction in front of each square, where a main pipe shall be laid at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets, and cleansing the gutters, and for any other public purpose; that on the squares which do not front on the river, the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners. It shall be the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter; *and in consideration thereof the franchise and property of said New Orleans Water Works Company, used in accordance with this Act, shall*

be exempt from taxation—State, municipal, and parochial.''

By an amendment of the Act, the exemption from State taxation was repealed.

The City of New Orleans brought the present suit to recover $11,484.87, amount of taxes levied on the defendant's property for the year 1881.

Defendant, in answer, pleads, in bar of plaintiff's action, the exemption granted by the foregoing Act; and then, reconvening, demands that in case the plea of exemption should be overruled, the city should be condemned to pay the value of the water used during the year for which the tax was levied.

Judgment was rendered in favor of the city for the tax claimed and in favor of reconvenor against the city for the value of the water, viz: the sum of forty thousand two hundred and eighty-one dollars and eighty-seven cents.

The correctness of the judgment for the tax does not admit of question.

The courts organized under the Constitution of 1868 repeatedly decided that neither municipal authorities nor the State Legislature could validly exempt property from taxation, either by commutation of such taxes, or in any other manner, unless the property was "actually used for church, school, or charitable purposes." See specially: City vs. Lafayette Insurance Company, 28 An. 756; Louisiana Cotton Manufacturing Company vs. City, 31 An. 440; City vs. Louisiana Savings Bank, *Id.* 827; also, 27 An. 376, 646, 648; 28 An. 498, 512; 31 An. 292, 637, 519.

This jurisprudence has been followed by this Court, as at present organized. State vs. Louisiana Savings Bank, 32 An. 1137; City vs. New Orleans Sugar Shed Company, 35 An. 549.

To the extent that this subjection to taxation destroys or impairs the consideration upon which rests the contract of

defendant to supply free water to the city, defendant is undoubtedly entitled to relief, but to that extent only.

The position of defendant, impliedly though not expressly approved by the judge *a quo*, is that the exemption from taxation was the *sole* consideration of the defendant's obligation to furnish the city with free water, and that when the city elected to claim its taxes it released the defendant from its entire obligation to furnish water free and became bound to pay for all the water used, even though exceeding, as it does, three fold the taxes.

Such is not our view.

While the free water supply is declared by the Act to be the consideration, and doubtless the sole consideration, of the exemption from taxes the Act does not declare, nor do we think it means, that the exemption is the sole consideration of the obligation to supply the water to the City. On the contrary, we consider that the latter is a principal and fundamental provision of the contract, the consideration of which is found not only in the exemption, but in all the valuable privileges conferred by the Act.

This is so clear to our minds from the reading of the entire Act, and from the nature and purposes of the stipulation, as indicated by the title, that we deem it unnecessary to elaborate our reasons. The result is, that defendant has suffered, not a total, but only a partial failure of the consideration of its contract and is entitled to relief only *pro tanto*.

The principle governing the relief is well expressed by Mr. Parsons: "Where the consideration fails only in part, principles analogous to those which govern an inquiry into the inadequacy of a consideration would be applied to it. If there were a substantial consideration left, although much diminished, it would still suffice to sustain the contract. * * * If the consideration and the agreement

founded upon it both consisted of several parts and a part of the consideration failed, and the appropriate part of the agreement could be apportioned to it, then they might be treated as several contracts, and a recovery of money paid be had accordingly."

1 Parsons' Contracts 462.

Franklin vs. Miller, 4 A. and E. 605.

Roberts vs. Havelock, 3 B. and Ad. 404.

There could not be a clearer case for the application of these principles than this.

Defendant's obligation to furnish water to the city is unrestricted as to amount, and it appears that the City has actually used and the defendant has furnished water to the value of more than forty thousand dollars. *The extent to which the consideration has failed is exactly the amount of the City's claim for taxes.* If the City shall be condemned to pay defendant for that amount of water, exact justice will be done and defendant can claim no more.

But for the nature of the City's claim being for taxes, compensation would preserve the exact *status quo.*

We regret that the City's financial condition prevents the judgment against her from being the immediate equivalent, but the law regards interest as the only compensation for the delay which defendant may suffer in the collection of its judgment.

We observe that in the sugar shed case we allowed the defendant a judgment in reconvention for an amount slightly exceeding the City's claim for taxes. It may be that in that case, the exemption was the sole consideration of the *bonus;* but in any event, the difference between the two claims was so slight that the view now presented did not attract our attention. City vs. New Orleans Sugar Shed Company, 35 An, 549.

It is, therefore, ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the

principal of the amount allowed defendant on its reconventional demand from $40,281.87 to $11,484.87: and that, as thus amended, the same be now affirmed, defendant to pay cost of this appeal.

[The italics are by the present editor.]

[APPENDIX I.]

EXTRACT FROM THE REVISED CIVIL CODE OF LOUISIANA, OF CONVENTIONAL OBLIGATIONS.

No. XI.

Section 3 of the Object and Matter of Contracts.

ART. 1890 (1884).—A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked.

ART. 1891 (1885).—The object of a contract must be possible, by which is meant physically or morally possible. The possibility must be determined, not by the means of ability of the party to fulfil his agreement, but by the nature of the thing which forms the object of it.

ART. 1892 (1886).—That is considered as morally impossible which is forbidden by law, or contrary to morals. All contracts having such an object are void.

Office Supreme Court U. S.
FILED,
OCT 20 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 632.

THE CITY OF NEW ORLEANS AND JOSEPH A. SHAKSPEARE, MAYOR OF SAID CITY, PLAINTIFFS IN ERROR,

versus

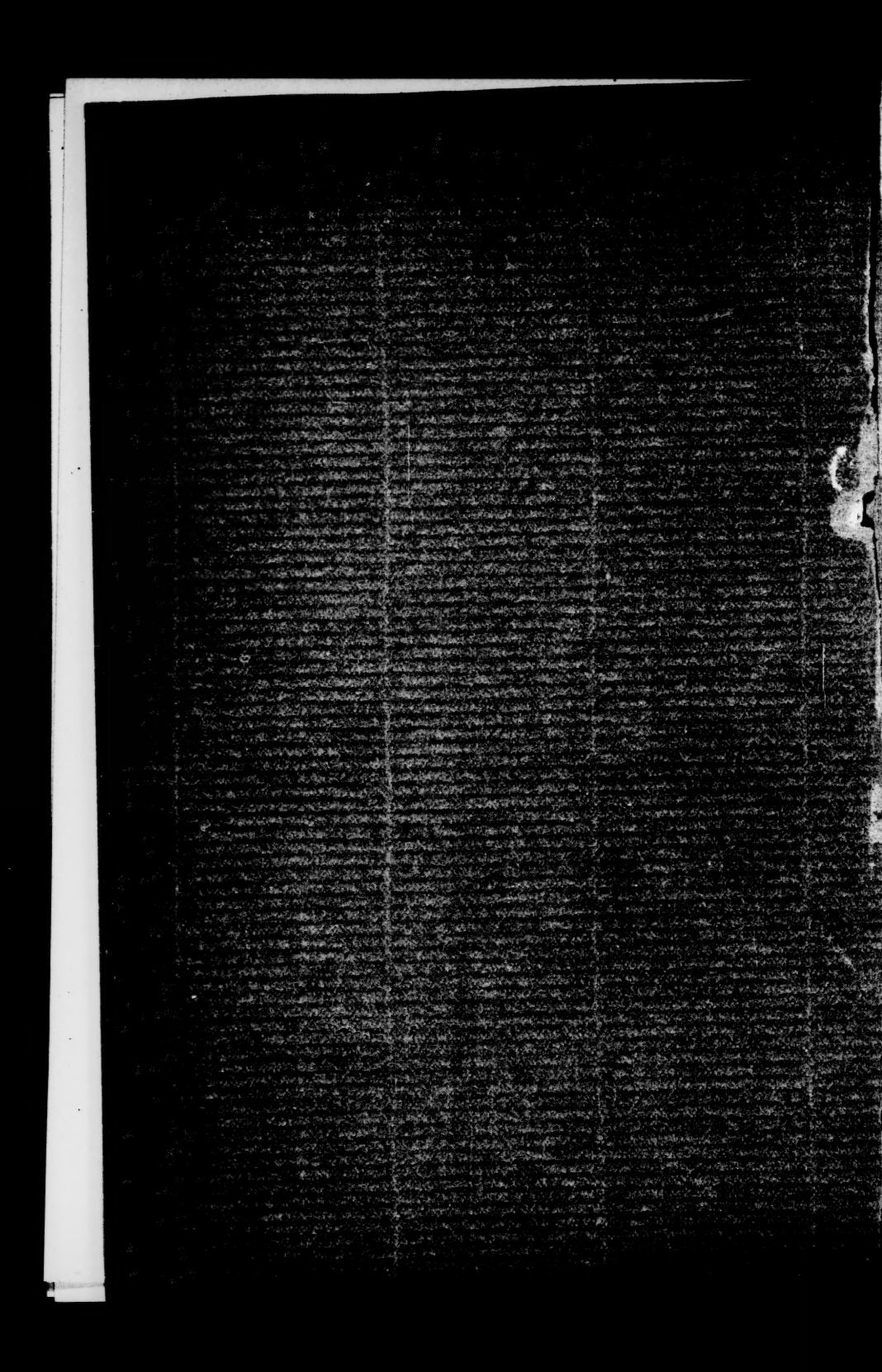
THE NEW ORLEANS WATER WORKS COMPANY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF OF DEFENDANT IN ERROR.

J. R. BECKWITH,
Counsel for Defendant in Error.

A. W. Hyatt Stat'y Mfg Co., Limited, 73 Camp street, N. O.—56,700.



Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 632.

THE CITY OF NEW ORLEANS AND
JOSEPH A. SHAKSPEARE, MAYOR, PLAINTIFFS IN ERROR,

versus

THE NEW ORLEANS WATER WORKS COMPANY.

E. CONERY, JR., ET ALS., TAXPAYERS, PLAINTIFFS IN ERROR,

versus

THE NEW ORLEANS WATER WORKS COMPANY.

Writs of Error to the Supreme Court of the State of Louisiana.

DOUBLE WRIT IN THE SAME CASE.

Brief of Defendant in Error, The New Orleans Water Works Company.

There are two writs of error in this cause. The first writ in order of date was sued out by the city of New Orleans and Joseph A. Shakspeare, Mayor, the city being a co-defendant with the New Orleans Water Works Company in the original

suit in the state court, without joining its co-defendant, this defendant in error, except as to defendant in the writ.

The other writ was sued out by the taxpayers, E. Conery, Jr., et al., the original plaintiffs below, in which it appears that every other party to the record, including the city of New Orleans, were made defendants in error.

The New Orleans Water Works Company, defendant in error in both writs, moved the court, at the October term, 1889, to dismiss the writs or affirm the decree. This motion was submitted in January, 1890, and by order of this court postponed, to be heard when the cause should be called for trial on the merits.

The first question, therefore, is whether there is jurisdiction in this court and whether the writs should have been allowed, the defendant in error still insisting on its motion to dismiss both writs for want of jurisdiction or any federal question either involved in the case or determined by the court below.

ABSTRACT OF PLEADINGS AND FACTS.

The petition was filed on the 2d November, 1885; the plaintiffs are Edward Conery, Jr., and a score or more of others, alleging themselves to be citizens of the State of Louisiana and of the city of New Orleans. The defendants are the New Oreans Water Works Company, Isaac W. Patton, Treasurer, John H. Hardy, Comptroller, of the city of New Orleans, and the city of New Orleans.

The plaintiffs aver that they are taxpayers of the city of New Orleans, and collectively pay into the city treasury, for city purposes, taxes exceeding the aggregate of $10,000; that the Legislature of the State, at an extra session in 1887, by Act No. 33, approved on the 31st day of March, 1877, incorporated a company styled "The New Orleans Water Works Company," the object of the act being declared to be to enable the city of New Orleans to promote the public health, and to afford greater

security against fire by the establishment of such corporation; to authorize the corporation to issue bonds for the purpose of extending and improving the water works, and to furnish the inhabitants of the city of New Orleans with an adequate supply of wholesome water.

That the act provided for the incorporation of a company with a capital stock of two millions of dollars, and granted the company the exclusive privilege of furnishing water to the city of New Orleans, or its inhabitants, from the Mississippi river, or any other stream or river, by means of pipes and conduits, for fifty years from the date of the passage of the act; that among other things, the eleventh section of the act of incorporation provided:

"That the city of New Orleans shall be allowed to use water from the pipes and plugs of said company now laid, or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets and charitable institutions, and that the said company shall place, free of any charge whatever, two hydrants of the most approved construction, in front of each square, where a main pipe shall be laid, at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets and cleansing the gutters, and for any other public purpose; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners. It shall be the duty of said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter; and in consideration thereof, the franchises and property of said New Orleans Water Works Company, used in accordance with this act, shall be exempt from taxation, State, municipal and parochial."

That by Act 43, of 1878, the said act of incorporation was amended in certain respects and particulars, and the word "State," in section eleven of said act, in the last line thereof, was stricken out, so that said company was made liable to State taxes.

That said act was accepted by the city of New Orleans, by

the holders of water works bonds, and the holders of city indebtedness, and that said corporation was duly organized; all of the property purchased by the city of New Orleans from the Commercial Bank was transferred and delivered to said corporation, and said corporation entered upon the performance of its functions and complied with the terms and provisions of said acts of 1877 and 1878.

That at the time the act of incorporation was drawn, and at the time the amendatory act was passed, permitting the organization of said company, it was notoriously known by every intelligent person in the State of Louisiana, and by all persons who participated in the organization of said company, that the Legislature had no power to exempt property from taxation of any kind or nature, except that which was actually used for church, school or charitable purposes, and that the framers of said act, and the incorporators of the said company at the time that the same was passed, knew that said exemption from taxation was null and void, and of no force or effect.

That for several years the Water Works Company supplied the city of New Orleans with water, and the city of New Orleans demanded no taxation from the corporation.

That in the year 1881, the city of New Orleans brought suit against the Water Works Company for the sum of $11,484 87, the amount of the taxes assessed against the defendant's property for that year; that in the suit the Water Works Company reconvened, and demanded payment for the water that it had furnished, and claimed a larger sum of money as the price and value of the water furnished during the year 1881.

That in the Civil District Court, where the case was tried, a judgment was rendered in favor of the city of New Orleans for the amount of the taxes for the year 1881, and a judgment was rendered on the reconventional demand in favor of the Water Works company and against the city for the value of the water supply of that year, for $40,281.87.

That the city of New Orleans appealed from the judgment to the Supreme Court, where the judgment in favor of the city for the taxes of 1881 was affirmed, and the judgment in favor of the Water Works Company against the city for the value of water supplied in 1881, was reduced to $11,484.87, the amount of the taxes for that year.

That the Supreme Court, in deciding the cause, interpreted the legislative contract made between the city of New Orleans and the Water Works Company, as contained in Act No. 33, of 1887, and declared that the Water Works Company, under the contract contained in its charter, had no power to demand or recover from the city of New Orleans, in any year, any sum, for the price of water supplied, greater than the amount of the city taxes for that year; that all this appears in the case of the City of New Orleans vs. the New Orleans Water Works Company, No. 9007 of the docket of the Supreme Court, and by the printed and published opinion of the Supreme Court, as contained in the 36th Louisiana Annual Reports, p. 432 *et seq.*

That after this judgment was rendered, the Water Works Company, striving and contriving to obtain some unjust and unlawful advantage over the city of New Orleans, and not satisfied with the terms and conditions of the charter alleged to be the law of its life, as determined by the Supreme Court, procured the legislature of the State, at its session, held in 1884, to pass an act known as Act No. 56, of 1884, entitled "An Act to provide for the supply of water to the city of New Orleans, by the New Orleans Water Works Company, in cases of the municipal taxation of said company; to authorize provision to be made for the payment of water supplied and to be supplied; to provide for obtaining a supply of clear or filtered water by the New Orleans Water Works Company, and to enable the city of New Orleans to contract for the same; to regulate the payment of said taxes imposed on said company, contrary to the exemption given in its charter, and to put into effect Section 11 of Act No. 33 of the Acts of 1877, E. S., in instances of refusing or contrary to the exemption therein."

That the first section of said act declares: "That in all instances of the taxation of the franchises or property of the New

Orleans Water Works Company, for any year or years, by or for the city of New Orleans, or for municipal purposes, whether such taxation be for past or future years, and the said company be in any manner obliged to pay, notwithstanding the exemption granted in Sec. 11 of Act No. 33 of the Acts of 1877, E. S., then, in all such instances, the said city of New Orleans is hereby empowered and required to pay the said company the value of all the water the said company has supplied or shall supply during any year or years for which said taxes have been or shall be levied, to or for the use and purposes of the city of New Orleans, its public buildings, markets, or for streets, gutters, extinguishment of fires, or other public purposes."

That the second section of said act provides: "That in all instances of such taxation, contrary to said exemption, for any future year or years, the city of New Orleans shall provide in its budget, or shall set apart and appropriate a sum sufficient to pay for the said water supply for said year or years; and unless this be observed and done, the said company shall not be compelled to deliver water for the uses and purposes aforesaid."

That the third section of said act provides: "That any taxes already imposed for any year, contrary to said exemptions, shall not be exacted, nor any penalty or interest accrued be demanded thereon, or begin to run until said city shall have provided for the payment of the water supplied in said year, or provision made therefor by remedy at law or equity."

That the fourth section of said act provides: "That to secure the inhabitants of New Orleans and to the use of the city a supply of filtered or clear water, the city of New Orleans be and is hereby empowered to contract with the said company, and determine upon terms and conditions, and fix a price for obtaining from said company such supply of clear or filtered water."

That the fifth section of said act provides: "That nothing in this act shall be construed as in any manner abridging or

otherwise affecting any of the rights, franchises and privileges heretofore granted to said company; but all such rights, franchises and privileges shall continue and belong to said company."

That the sixth section of said act provides for its going into force from and after its promulgation.

That pretending to act under the authority of this statute, the City Council of New Orleans, on the 23d September, 1884, passed a certain ordinance numbered 909, C. S., a copy of which is contained in a contract referred to in the petition as marked "B," being the contract assailed in this suit.

That the ordinance referred to authorized the mayor of the city to enter into a contract with the New Orleans Water Works Company on the terms and conditions set forth in the ordinance.

That on the third day of October, 1884, Guillotte, Mayor, and the Water Works Company entered into a contract before Jos. D. Taylor, notary public, in alleged compliance with Ordinance No. 909, a certified copy of which is alleged to be annexed to and made a part of the petition; but to prevent repetition of the same instrument in the transcript, is to be found in the transcript, p. 145 *et seq*.

The petition avers, as a construction of that contract, that the Mayor and Council of the city undertook to bind the city during the whole of the remainder of the term of the charter of the Water Works Company (a period alleged to exceed forty years), to pay the Water Works $60 for every fire plug, fire hydrant and fire well connected with the mains and pipes of the company, of which, at that time, there were 1139. The contract stipulated that that number should be the least measure of the annual sum to be paid, *i. e.*,, $60 per plug on that number of plugs and fire wells. That upon notification to the company in writing, there might be an increase of the plugs, hydrants, etc.; that the city contracted to make annually special appropriations,

in the annual budget, of the sum necessary to pay the amount stipulated under the contract, in monthly payments, and to set apart and hold the money or appropriation as a distinct fund to carry out the contract. That there are other details in the contract which the petitioners deem unimportant and unnecessary to mention, but which are shown in the copy of the contract referred to in the petition as document "B;" that this water supply, provided under the contract, was the identical water supply mentioned as set forth in the charter of the company.

That said Ordinance No. 909, and the contract made in accordance therewith, were not authorized by the terms of Act No. 56, of 1884; that said act did not contemplate that the contract relations of the city of New Orleans and the Water Works Company, as set forth and interpreted by the Supreme Court, should be, in any manner, changed, unless it be for the purpose of enabling the Water Works Company to furnish clear and filtered water; that if Act No. 56 did contemplate that the city of New Orleans and the Water Works Company should enter into a contract stipulating what the value of the water to be supplied by the said company to the city should be, then Act 56 is unconstitutional and void:

(1) Because it violates paragraph 13, Art. 246, of the existing Constitution: "That the General Assembly shall not pass any local or special law creating corporations, or amending, renewing, extending or explaining the charter thereof."

(2) It violates Art. 57 of the Constitution of 1879: "That the General Assembly shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness or liability of any corporation or individual to the State, or to any parish or municipal corporation."

(3) It violates Art. 234 of the Constitution: "That the General Assembly shall not remit the forfeiture of the charter of any corporation now existing, or renew, alter or amend the

same, nor pass any general or special law for the benefit of said corporation, except on the condition that the said corporation shall thereafter hold its charter subject to the provisions of this Constitution."

(4) It was repugnant to Art. 45 of the Constitution, as embracing more than one object.

That the city of New Orleans, in its budget for the year 1885, set aside and appropriated the sum of $68,340 to be paid to the Water Works for water supply for the year 1885; that the taxes for the Water Works Company for that year were only the sum of $11,352; that at the time of the institution of the suit, the sum of $39,875 had been paid to the Water Works Company out of this appropriation; that unless restrained by injunction, the city would continue to make appropriations and pay out the balance of the same under the terms of the contract, in monthly installments; that the plaintiffs, through something, which they denominate a "committee of one hundred citizens," have presented a petition to the council, protesting against the contract, calling the Council's attention to their opinion that it was illegal, and had required of the Council to take some action to break up the contract; but that the Council had refused to take any action, and the plaintiffs and the "Committee of One Hundred" believed that the Council intended to take no action.

That the contract is "illegal, *ultra vires*, unconstitutional, null and void, and of no effect."

The petition prays for an injunction against the defendants, declaring the contract assailed null and void; Ordinance No. 909 null and void; Act No. 56 of the Acts of 1884 null and void; enjoining the City of New Orleans and its officers from pretending that the contract had any validity, and from making any appropriation of money to carry out the terms and conditions of the same.

On November 19th, 1885 (Rec. p. 21), the city of New Orleans filed an exception to the petition, setting up as grounds

of objection: (1) that the plaintiffs disclosed no legal cause of action; (2) that the plaintiffs disclosed no interest or authority to institute and maintain the suit, and prayed that it be dismissed.

On the 23d of November, 1885 (Rec. p. 21 *et seq.*), the New Orleans Water Works Company also filed an exception, setting up as grounds of exception: (1) that there was no privity between the plaintiffs; no right was shown in the petition for joining them as plaintiffs; that if plaintiffs had any right of action it was several to each plaintiff; (2) that taken either collectively or severally, plaintiffs disclosed no right to institute or prosecute the suit, or to stand in judgment; (3) that if the plaintiffs had disclosed any cause of action, or any collective or several right of action against the defendants, which is denied, that it does not appear, nor is it the fact, that plaintiffs have disclosed any money or pecuniary interest to be adjudicated which amounts to the sum of one hundred dollars, or any sufficient sum to give the Civil District Court jurisdiction; (4) That the alleged Committee of One Hundred is a myth, without juridical existence or power to sue or to stand in judgment or represent the plaintiffs; that the individual plaintiffs show no right to stand in court as plaintiffs in any action concerning the matter set forth in the petition, and that in the event the exceptions were overruled and held insufficient, saving and reserving the right to all of the several defenses, defendant peremptorily excepts that there is no cause of action whatsoever disclosed or shown as existing in the plaintiffs, either collectively or severally.

After some rather undignified skirmishing, the case was brought to trial in Division E, of the Civil District Court, on the exceptions. In accordance with the jurisprudence of the State as it then existed, the Court on January 18th, 1886, sustained the second ground of exception set up by the city of New Orleans, and the first and third grounds of exception set up by the Water Works Company, and dismissed the cause, with costs, R. p. 29.

An appeal was taken from this judgment, and the State Supreme Court, following the doctrine of the, then, recent Handy case, reversed the judgment dismissing the suit, and remanded the case to the lower Court for further proceedings.

On the 27th of May, 1887, the city of New Orleans, reserving the exceptions already filed, put the case at issue by plea of general denial (R. p. 13). On the same day the Judge of Division E recused himself, and the case fell to Division C.

On June 3d, 1887, the New Orleans Water Works Company filed its defense, insisting upon all of the exceptions that had been previously pleaded, generally denied all the matters set up in the petition, taking full issue of fact and law thereon, except as to matters that were specially denied, or admitted and avoided; specially denied that the plaintiffs had any legal or pecuniary interest in the matters complained of in the petition, or that they would be in any manner damaged or subjected to any pecuniary loss or damage by reason of any matter set up in the petition; admitted that the legislature of the state had adopted and promulgated Act No. 33 of the extra session of 1887; alleges that the action of the legislature was promoted and secured by the city of New Orleans to relieve itself of a large portion of its interest-bearing public debt, and of an annual deficit in carrying on the water works as a city institution; that as the legislation stood under this Act 33, no person would accept the conditions of the act, its provisions being too burdensome, and that there was no organization under that act; admits that afterwards, at the instance and request, and by the procurement of the city of New Orleans, the legislature enacted Act No. 43, of the acts of 1878, modifying and changing the terms of the act of 1877, as shown by the published act, and that under the provisions of both acts the New Orleans Water Works Company was organized and went into existence; that the acts of the legislature constituted the charter of the defendant company, and became a contract between the city of New Orleans, the state of

Louisiana and the defendant company; that all the provisions compacts and covenants contained in the act were guaranteed unto the defendant company in full and exact fulfillment and observance by the constitution of the United States, and particularly section 10, article 1 thereof; that the charter, as a compact and agreement, was accepted by the defendant company on the faith of the guaranteed protection of the federal constitution; that the sum of $2,000,000 was paid as a consideration of the covenants in the charter, that ought to have been kept and observed by the city of New Orleans, by the state, and all the citizens and inhabitants thereof. Defendant expressly denied that the construction put upon Ordinance 909, and the contract made under its authority, as set forth in plaintiffs' petition, is correct, just or true, but asserts the construction of the contract as therein contained is untruthful, dishonest, and a fraud upon the rights of the defendant; admits that there was litigation on the part of the city of New Orleans with the Water Works Company, relative to an alleged municipal tax charged against the defendant for the year 1881; but in all things contended that the same is not correctly or truthfully set forth in the petition, or that the result or effect thereof was, or ought to have been, the result or condition of things set forth in plaintiffs' petition.

That it is not true that the defendant ever attempted to, or did obtain, any unjust advantage over the city of New Orleans, as averred in the petition.

That the city of New Orleans is, and at all times referred to in said petition, was the largest single shareholder in the shares and stock of the New Orleans Water Works Company, and had, and has by law, a fixed representation in the Board of Directors of said company larger than is proportionate to its holding of shares in the capital stock of the company; has been at all times, through its directors, a participant in the management and direction of the affairs of the defendant

company; and cannot be deceived and imposed upon by any of the acts of the Board of Directors of the defendant company.

Admits that the Legislature of the State, with the approval of the Governor, made and promulgated Act 56 of the Acts of 1884, but denies that the terms and true legal construction of the acts are correctly set forth in the petition, and refers to Act No. 56 as a part of the answer, for the true, actual and proper construction of the act.

Specially denied that Act 56 was intended to or did confer on the defendant any advantage or benefit, or effect any change or modification in any respect or particular in the charter of the defendant company; but avers that if it did benefit or confer advantage, or otherwise modify the defendant's charter, or could be so construed, the act in that case would be of no effect to accomplish that end, under any circumstances, until fully and solemnly accepted by the act of the shareholders of the defendant company, acting together in a general meeting of such shareholders called for that purpose; that there never was any such meeting, or any such acceptance.

That it is not true that Act 56, of 1884, is subject to the vices and alleged nullities charged against the act in the petition, nor is it true that the validity of the contract assailed in this suit depends upon the validity of the said Act 56 of 1884, nor was said act of 1884 necessary or material to authorize the city of New Orleans to make and enter into the said contract; but on the contrary, the city of New Orleans, at the time of the execution of the contract, had full and competent authority under the charter of the city without Act 56, and that the validity of the contract assailed does not depend upon Act No. 56; but is in all things a valid contract, in full force and effect, and would be if said Act 56 had never been adopted, and that said contract is not invalid by reason of any supposed vices, or the invalidity of the Act 56 set up in the petition.

Denies specially that the water supply provided and con-

tracted for in the contract assailed is the same as provided for in the charter of the defendant, as a consideration for the covenant of exemption from taxation, but is for another different and increased supply of water, to be delivered at higher pressures, at different localities, for additional purposes, with different distribution, than the supply provided for in the charter of the defendant, and the delivery of the new water supply as set forth in the contract is attended with much greater expense and cost to the defendant than was the supply named in the defendant's charter.

That it is not true the price contracted to be paid by the city of New Orleans in the contract assailed in this suit, is exorbitant, but in truth is far below the value thereof.

That the defendant is required to pump ten millions of gallons of water a day, and that of this supply nearly one-third is consumed and expended by the city of New Orleans for municipal purposes, and for purposes named in the contract assailed; that there is no profit to the defendant in said supply at the rate of pay therein stipulated, and that it is impossible for the city of New Orleans to obtain the same quantity of water for the same purpose by the use of a plant of its own and with its own machinery, without the expenditure of a much larger sum of money than the sum provided for in the contract.

That while the water works were in the possession and ownership of the city, after purchase from the Commercial Bank, prior to the transfer to the defendant company, the like quantity of water for public supply cost the city of New Orleans a sum far in excess of the sum named in the contract; that it is not true, either in law or fact, that the defendant is compelled to submit to the active abrogation of its rights under the statutory contract of exemption from taxation, and yet supply the city of New Orleans with a public water supply for the inconsiderable sum or sums of money named in the petition, the same being actually far below the cost of such supply.

That if there is any law or apparent authority vested in the judicial, or any other department or branch of the government of the State of Louisiana, under the operation of which the defendant company can be compelled to submit to such wrong, such power or authority has been incorporated into the state government since the date of the contract between the defendant and the city and state, and since its statutory charter was entered into and was complete as a contract, and any such power or authority in the government of the state, if it exists, is an illegal device for the impairment of the obligation of contracts, and as such, repugnant to the Constitution of the United States, particularly Article 1, and of no avail as against the defendant corporation, its charter being protected and guaranteed by the Constitution of the United States.

That the contract assailed rests upon the legislative action of the city of New Orleans, acting through its legislative and executive department as a municipal corporation in the lawful exercise of its power and capacity, and is political in character, and not reviewable by the judicial department of the State government, and prayed judgment against the plaintiffs.

On June 24th, 1887, the exceptions originally filed and not disposed of on the appeal to the Supreme Court, were submitted to the court for judgment, held under advisement until January 2d, 1888, when the court by an opinion found on page 18 *et seq.*, disposed of the exceptions, and the case was held on the docket for trial on its merits.

On June 12th, 1888, the late Judge John A. Campbell appeared in the cause, as counsel for the Water Works Company, and prepared and filed, by leave of the court, on June 12th 1888, an addition to the answer of the Water Works Company already filed, amplifying the defenses, setting up substantially the same matter of defense, more in detail. This answer is found on page 25 *et seq.*, of the record.

This continued to be the state of pleadings until the 3d day

of November 1888, when the city of New Orleans, through its attorney, appeared in court and executed an extraordinary double somersault. After standing for years on the record, affirming the validity of the assailed contract and denying that it was subject to any vices or nullities, the city attorney came into court, and without acknowledging the loan, borrowed the plaintiffs' petition, copying its averments, both substantial and unsubstantial, styling his pleading an "amended and supplemental answer of the city of New Orleans," applied to the court and obtained leave to file (*Rec. 29 et seq*). This pleading is not only remarkable for being at direct variance with the pleading of the city as it had stood for years, but is further remarkable as an effort on the part of a defendant to desert his co-defendant and go into the camp of the enemy, without being able to take his former pleadings with him, and remarkable also in the fact that the pleading is embellished with a prayer for citation against its former co-defendant, the New Orleans Water Works Company. This was probably intended to demolish its former plea of general issue. The New Orleans Water Works Company was served with the paper and with the citation, and on the 14th of November, 1888, not knowing what else to do with the document, out of respect to the court and its summons, filed an answer to this extraordinary paper, alleging and excepting that the paper was a form of pleading and proceeding entirely unknown to any system of law or pleadings, and unwarranted by any law or procedure in force in the State of Louisiana, yet under protest, and to avoid any further delay in the prosecution of the cause, in response to the citation, answered : (*Rec. 34 et seq*).

That if the pleading was taken or considered as amended or supplemental answer of the city of New Orleans, it was illegal and void, in that it was not consistent with the former answer of the city on file in the cause, that being in effect a denial of all the alleged vices charged against the contract by these tax-paying plaintiffs.

That the defendant, the New Orleans Water Works Company, had, prior to said pleading, acquired lawful and vested right and property in the judicial confession of the city of New Orleans, contained in its former pleading, and that this unconditional right could not be impaired, avoided, or the answer contradicted without the consent of the New Orleans Water Works Company; that no such consent had been given.

That the city of New Orleans had, by its pleading prior to the filing of the said paper, not only executed the contract assailed in the plaintiffs' petition, but by the formal pleading in this case had re affirmed the validity and lawful binding effect of the contract, and was estopped in law from resorting to any pleading, taking any steps, or demanding any relief inconsistent with the original answer; and further, that the city of New Orleans was estopped by *election* from assailing the said contract by said alleged pleading, or in any other manner, and because the city of New Orleans has three-sevenths of the direction of the affairs of the New Orleans Water Works Company and is in law and good conscience bound to deal with the shareholders, represented by the city of New Orleans, with a distinct regard to their rights, at least with such regard and faithfulness as is demanded of others who hold positions of trust or control, or manage or direct the affairs of others as trustees, and while holding that capacity as directors of the Water Works Company they are not permitted by law to either directly or indirectly assail the property, over which they exercise a trust, with intent to impair the value thereof to the holders of the stock of the company.

That further, that the matters set up in said pretended, amended and supplemental answer, cannot in law be set up by the city of New Orleans in so far as the matter charges fraudulent combination between the city of New Orleans and the Water Works Company, for the reason that being parties to the contract, they are not permitted in law to set up their own

alleged fraud, or frauds, in which they participated, and ask relief from the consequences thereof.

That all the matters set forth in said pleading are not sufficient in law to entitle the city of New Orleans to the relief prayed for in that all and singular the matters set forth in said pretended, amended and supplemental answer are untrue, both as to fact and law.

STATEMENT OF THE ISSUES OF LAW AND FACT ARISING ON THE TRIAL.

The trial was opened by Mr. Farrar, counsel for E. Conery, Jr., et als., by offering in evidence Act No. 33, extra session of 1877. Before this or any evidence was admitted, counsel for the Water Works demanded of Mr. Farrar, in whose behalf he appeared, and for whom he offered evidence. He replied that he represented E. Conery, Jr., et als., taxpayers; did not represent the city of New Orleans, and offered evidence only in behalf of the taxpayers, E. Conery, Jr., et als. Whereupon, counsel for the Water Works Company objected to the introduction of any evidence whatsoever in behalf of E. Conery, Jr., et als., plaintiffs in the original petition, for the following reasons, among others:

That E. Conery, Jr., and others appear, by the petition and record, to be simple individual atoms or members of the corporation aggregate, the city of New Orleans, possessed of no other rights or authority than is possessed by the balance of the more than two hundred thousand individuals together, constituting the corporation aggregate., that it appears from the record that prior to the case being called or fixed for trial, the city, of its own volition, in a formal pleading, termed a supplemental answer, accompanied with citation, addressed to its co-defendant, the Water Works Company, and filed under authority of an *ex parte* order of the court in the case, had, in so far as it was possible, become plaintiff in the action of its own accord. That the only ground upon which the taxpayers had been allowed to act

as plaintiffs or institute the suit rested upon a traversable allegation in the petition that the city, as a corporation, when requested, refused or neglected to assail the water works contract; that this reason no longer existed, the city having been allowed, by a formal order of the court, to take the position of plaintiff on the record, had absorbed all of the taxpaying plaintiffs, who were at best only molecular atoms of the corporation itself.

The court overruled this objection, to which ruling the counsel for the Water Works excepted, and reserved a bill of exceptions. R. p. 36 et seq.

To save the constant repetition of the same objection to all the testimony offered, it was agreed between counsel for the taxpayers and counsel for the appellant, that the same objection, the same ruling, the same exception, and the same reservation of a bill of exceptions, should be considered as taken to all testimony afterwards introduced by E. Conery, Jr., and others, R. p. 39.

It was further agreed that all acts of the Legislature, offered by either side, should not be copied into the transcript, but referred to in the acts as printed by authority, R. p. 39.

E. Conery, Jr., and others, subject to this objection, offered the acts constituting the charter of the Water Works Company, including Act 43 of 1878, and then offered Act 56 of 1884, following their offer of the act with copies of certain numbers of the New Orleans *Daily States*, including the publication of a notice of intended application to the Legislature for legislation to regulate the use, by the people and municipalities, of water pumped or obtained by Water Works Companies.

To the introduction of this evidence, the Water Works objected, (1) The evidence was in all things irrelevant and immaterial, not tending to prove any lawful issue in the case.

(2) The plaintiffs having, in their petition, alleged Act No. 56 of 1884, to be an absolute nullity, for reasons alleged by them to be apparent on the face of the act, in so far as they are con-

cerned, it is immaterial how, or by whom, Act 56 was formulated, or who promoted the action of the Legislature, or what motive moved the Legislature in voting for, or adopting the act.

(3) That if the Legislature had the right to legislate upon the subject matter contained in Act 56 of 1884, the validity of that act, or of the legislative action cannot be assailed by any proof concerning the motives of the promoters of the act. or of the members of the General Assembly who voted for the act, or by any evidence tending to show that they acted without sufficient intelligence or integrity.

(4) That Act 56, on its face, purports to be simply an enabling act, permissive in character, and was not to have any effect except under certain conditions, the conditions being under the control of the city of New Orleans, and in the nature of things could not, as legislation, be used as a means or instrument of fraud, until after its adoption.

(5) That if the proof is sought to be introduced as tending to show that the adoption of the act affected the Water Works monopoly, or modified its charter, the question is not triable in this suit, and can only be put at issue and tried on proceedings taken by the State in the nature of quo warranto; and further, that, if the evidence is offered as tending to show fraud perpetrated by and between the defendants, the city and the Water Works Company, E. Conery, Jr., and others, as taxable plaintiffs, are simply members of the city corporation, and as such are, in law, estopped through the legislative action of the city through its Council, and are estopped just *when* and *where* the city is estopped.

That by the original answer in this case, made and filed by the city, it is estopped by all manner of estoppel, from alleging fraud in the contract assailed in this suit, being estopped not only by its answer denying all of the frauds alleged against the contract in the petition, but estopped because

in a suit to annul the contract for fraud, the city itself could not set up its own fraud as a ground of recission; the taxpayers having no more capacity or liberty in that particular than the entire corporation aggregate itself possesses, are subject to the same estoppel.

All of these objections are elaborated in the transcript, p. 40, *et seq.*

The court overruled the objections and admitted the testimony. The appellant excepted, and reserved its bill of exception, R. p. 41.

By agreement of counsel this bill was made to apply to all testimony relating to the same matters and questions, without formal repetition of the objection and ruling.

E. Conery, Jr., and others next offered in evidence the record in the case of the city of New Orleans vs. the New Orleans Water Works Company, as the same appears in transcript under the docket number of 9007 of the docket of the Supreme Court, admitting that the appellants in this case, obtained a writ of error from the judgment in that case, to the Federal Supreme Court on the 11th January, 1886, and that the suit is undetermined in the Federal Supreme Court, and was still pending there on error, R. p. 42 *et seq.*

To this offer the appellant objected for the reason that it appears that the controversy in that case was a limited special dispute, simply a controversy concerning a particular alleged demand, in the form of a municipal tax for the year 1881, and was, and is, conclusive of nothing else, and affects no person, matter or thing relating to the period of time covered by the controversy in this case. The court overruled the objection and admitted the evidence. The appellant excepted and took its bill of exceptions.

It was agreed that budgets of appropriation or estimated revenues of the city of New Orleans for the years 1885, 1886, 1887, 1888 and 1889 are public documents and should be con-

sidered in evidence without formal production and incorporation into the transcript. And further, that Ordinance No. 909, as set forth in a notarial act before city notary Taylor, between the city and the Water Works Company, as offered by E. Conery, Jr., et als, is correctly set forth in the act, and shall be taken as Ordinance No. 909.

The plaintiffs, E. Conery, Jr., and others, produced Thomas O'Connor, the chief engineer of the Fire Department of the city, and propounded to him a question whether fires were more frequent in the night or in the daytime, Counsel for appellant then inquired of counsel for E. Conery, Jr., and others what was intended to be established by the proposed evidence. Counsel for E. Conery, Jr., and others stated that it was offered to show that the water supply contracted for in the act of sale is identical with the water supply provided prior to the contract; that while the supply, by the terms of the new contract, was apparently larger and more onerous than the supply provided for in the statutory contract contained in appellant's charter, yet the water supply under the new contract "is just as inefficient as it had been for nearly twenty years in this town," R. p. 57.

To the introduction of this evidence the Water Works Company objected on the ground that the question of performance or non-performance of the contract assailed had never been tendered as an issue in the cause. The averment in the petition is that the contract was, from its inception, absolutely void, for absolute vices apparent on its face, by reason of which it never became a contract of any binding import or character whatsoever, not that it became void because it was an indiscreet or improper contract; that it is not competent in any event to impeach the legislative action of the City Council by assailing its sagacity, its intelligence, or its motives, while acting within the range of its charter powers.

The court overruled the objection, allowed the witness to

testify in the cause. To this ruling the appellant excepted and took a bill of exceptions, R. p. 58.

The result of the testimony of this witness was disappointing to the counsel who offered it, as his testimony established a decidedly improved condition of water supply.

A Mr. Toby was then called, and gave confused testimony relating to the water pressure. This testimony was afterwards overthrown by the testimony of Gardner and Houston, but was taken subject to the exception of immateriality and the other objections taken when this class of evidence was first admitted to be subject to the bill of exceptions above referred to.

At the same time, the taxpayers offered in evidence the annual reports of the Water Works Company, to what end or for what purpose is not apparent, and then rested.

Then occurred one of the extraordinary episodes of the trial. The city having, up to that time, offered no proof of any kind, was now heard from, and offered, "as evidence for the city, all the testimony and documents introduced and filed herein in behalf of E. Conery, Jr., and others, original plaintiffs herein." (Rec. 72.) The city was met with striking ingratitude in the camp to which it had deserted. The taxpayers' counsel, instead of meeting the city attorney with open arms, and manifesting gratitude, kicked the new recruit out of the camp of the free lances, by successfully objecting to the introduction of any evidence whatsoever in behalf of the city, sending the city back to find all the consolation to be obtained from its former answer, denying all nullity and invalidity in the contract assailed. The objection, as formulated, was "on the ground that the amended answer, in response to which this testimony and evidence is offered, tends to change the issue in the case and upset the orderly conduct of this cause, as provided in the Code of Practice, and for that reason only this offer by the city of New Orleans should be excluded."

The Water Works Company objected to the proof on the

same ground that it had objected to the introduction of the same proof by the taxpayers, reserving all bills of exception and insisting upon all estoppels which by law are imposed upon the city by its pleadings and by reason of its being party to the contract assailed.

To this ruling, rejecting all of its evidence, the city excepted, and took a bill of exceptions.

By this ruling the city went out of the case, except as an original defendant, standing on the general issue, and seems to have been contented with its fate, for it has never appealed from this judgment or any order or decree in this case, and was not in the Supreme Court as appellant in any form. As the record stands, the city submits to the judgment kicking it out of court as a reinforcement of the taxpayers, under its alleged amended and supplemental answer.

Then followed an equally extraordinary occurrence in the litigation. It appears (R. 73) that after the tax-paying plaintiffs had concluded their evidence, their counsel, before any evidence had been offered by the Water Works Company, moved that the defendant company be compelled to elect the law upon which it based its rights under the contract assailed. The motion is involved in statement, and seems to refer to some antagonism between the original answer filed by the company and the amplification of the answer as prepared by the late Judge Campbell, an antagonism having no existence in fact. If it is possible to make anything definite or intelligible out of the motion as it appears in the record, it is a call upon the Water Works Company to elect whether it believes Act 56, of 1884, indispensable to the validity of the contract assailed, or whether it abandons that act and claims the city to have had authority to make the contract under its charter powers, or under the general law relating to the implied powers incident to corporate life.

This was opposed by the Water Works Company as unwar-

ranted in law or practice; that there was no discrepancy in the appellant's pleadings; that the election called for was not an election upon what *facts* the appellant would stand, but *what law it would renounce.*

The court allowed the motion, to which the Water Works Company excepted, and reserved its bill of exceptions, R. 74, *et seq.*

The order, as made by the court, was: "That the defendant ought to be required to elect:

(1) "Whether it stands upon the position that Act 56, of 1884, is operative as to its rights and obligations under its charter, and under the contract which is attacked in this case, and whether it has accepted, or has not accepted, the said act of Legislature in such manner as to be bound by its conditions.

(2) "Whether it relies upon said Act 56, of 1884, as material to the validity of the contract attacked or not."

The district judge seems to have acted upon the hypothesis that the question as to whether the Water Works Company had lost its monopoly through the operation of Act 56, was involved and triable in this cause. How this impression was created, it is impossible to conjecture, as nothing can be farther from the fact, nor is it comprehensible that an act of the legislature denounced in the petition in this case as null could, if the petition be true, affect the charter of any corporation, or, in fact, affect anything on earth, except the amount of the bill for public printing.

The position of the taxpayers' counsel is at least anomalous. He denounces Act No. 56 as waste paper, in his petition, and in his motion deals with it as effective law in force as an act of legislation.

In compulsory compliance with this order, the Water Works Company filed, January 16th, 1889, the following paper, R. 100 *et seq.*

"The Court having, on motion of E. H. Farrar, Esq., attorney for E. Conery and others, taxpaying plaintiffs, made the following order in this cause, which is of record as follows: 'The court therefore thinks that the defendant ought to be required to elect (1) Whether it stands upon the position that Act 56 of 1884 is operative as to its rights and obligations under its charter, and under the contract which is attacked in this cause, and whether it has accepted, or has not accepted, such act of the Legislature in such a manner as to be bound by its conditions. (2) Whether it relies upon said Act 56 of 1884 as material to the validity of the contract attacked, or not,' now therefore by compulsion, and not of their free will, but at all times excepting to said order, and insisting that the defendant, the New Orleans Water Works Company, ought not to be compelled to elect the law to be applied to the controversy involved in this suit, and that it is not, and will not be bound by such election in any other court or tribunal that may hereafter acquire jurisdiction of this cause, by appeal or otherwise, nor in any other cause to which this defendant may be or become a party, through its undersigned counsel in this Court, and for no other court or tribunal whatsoever, says:

(1) "That as to and concerning the first distinct matter or proposition stated in the first subdivision of said order, to-wit: 'Whether it stands upon the position that Act 56 of 1884 is operative as to the rights and obligations under its charter,' this defendant elects and believes the law to be that said Act 56 is valid and lawful legislation, and in force in this State with such force, effect and construction as in law it ought to have, and that being a part of the law of the land, this defendant ought to rely thereon, if it contains any provision affecting this controversy, to the same extent that it may lawfully rely on all other law of the land affecting this controversy, or the validity of the contract attacked in this suit, and is the law in force and effect, or of any advantage to this defendant in that respect and behalf.

(2) "That as to and concerning the inquiry next in order propounded in said first paragraph of said order, to-wit: 'Whether said Act 56 of 1884 is operative as to its rights and obligations under its charter,' said counsel say, that after careful consultation and consideration they are uncertain as to the exact range and meaning of said inquiry and order in this respect and particular, or concerning what exact matter they are by said inquiry called upon to elect; but consider the same as intended to compel this defendant to elect whether said Act 56 of 1884, if it is valid, has the effect in law to remit any forfeiture of defend ant's charter, or to renew, alter or amend the same, or is in law a general or special law for the benefit of the said defendant as a corporation in any sense considered in Article 234 of the Con-

stitution of this State; or whether said act, by its adoption, put any limitation on the rights or franchises of the defendant not in operation or effect before its adoption. It is the election of this defendant that in law, the adoption of said Act 56 had no effect whatsoever on the defendants' charter, either in the form or object of said law, and could in no event have such effect while defendants' charter, as a contract, is under the protection of the first Article of the Constitution of the United States.

(3) "That as to and concerning the third inquiry in order, as set forth in said first paragraph of said order, to-wit: 'Whether said Act 56 of 1884 is operative to effect the rights of said defendant under the contract which is attacked in this case,' said defendant elects the law to be that both the city of New Orleans, through its legislative and executive department, and the New Orleans Water Works Company, through its Board of Directors, had full and competent power and authority, under their respective charters, to lawfully enter into and make the contract which is attacked in this case before said Act 56 of 1884 was passed, and if that act had never existed: that the adoption of said Act 56 did not limit or restrict the said pre-existing power and capacity existing in either or both of the corporations, and claims the benefit of all the law of the land that may protect the said contract, even if it be cumulative law, in character.

(4) "That as to and concerning the last inquiry contained in said first paragraph of said order, to-wit: 'Whether it has accepted said act of the Legislature in such manner as to be bound by its conditions,' said defendant elects the law to be that if said Act 56, of 1884, is void for any of the vices alleged against it in the plaintiff's petition, there can be no acceptance by this defendant, or any corporation, that would have any effect in law, and that if the plaintiffs' petition is false in law and the act is valid, the petition to the contrary notwithstanding, the said act does not by its text impose on the New Orleans Water Works Company a single condition of any character or description; but if the act imposes conditions of any kind upon any one, such conditions are imposed on the city of New Orleans and not on the defendant.

(5) "That as to and concerning the second and last paragragh in said order to-wit: 'Whether it relies upon said Act 56 as material to the validity of the contract attacked or not,' said defendant elects and will maintain that the contract attacked, would, in law, be binding and valid if Act 56, of 1884, had never been adopted; that if said Act 56 had, or has, any effect on the rights of the parties to the contract to make the contract, it is cumulative with pre-existing laws that fully warranted the contract, and was neither indispensable to the binding effect of the contract, nor any limitation upon the pre-exist-

ing powers of either of the parties to make the contract; that Act 56 was immaterial to the validity of the contract only in the sense that the contract would have been valid without the operation of Act 56, of the Acts of 1884, referred to in said order, and whether the act of the Board of Directors of the defendant company in joining in the contract attacked in this suit is an acceptance of the said Act 56, of the said Acts of 1884, is a question of law, and if material to any lawful issue in this case, is put at issue herein by the general denial pleaded herein, and insists that upon that question of law, as well as upon all other matters of law, as above stated, this defendant is entitled to a trial by the courts in due form, and not affected by this compulsory election under the said order of the court aforesaid."

If, as the district judge evidently believed, the question whether Act 56 effects any change in the charter contract of the Water Works Company is an actual issue in this cause, there was incorporated in the record, by this compulsory election, a federal question, set up by the defendant, but, if determined by the Supreme Court the determination was in favor of the party setting up the question.

At the time the water works charter was made and accepted, the provisions of the constitution of 1879, prohibiting monopolies, except in favored cases, and authorizing corporations to appeal to the legislature for relief or redress, only upon condition of their surrender of substantial and material rights, was not in existence.

The condition and character of the corporate life granted the Water Works Company in its charter gave it the common right of all citizens to petition and appeal to the legislature for redress and relief, as a part of its corporate life, and a part of the contract for which more than value was paid. If any effect can be given to the constitution of 1879 to cut off this right, it impairs and changes the measure of corporate life conferred upon the Water Works Company, and makes the condition of its corporate life other and different from the life granted in the charter—a life more constricted than the measure of life granted and paid for, by taking away the pre-existing right to unrestricted peti-

tion and appeal to the legislature for redress, possessed by it at that time, in common with all other citizens of the state, and is an impairment of the obligation of the original contract, in studied violation of the provisions and guarantees of article 1 of the federal constitution. This question is fairly and distinctly made in the election that the appellant under the order of court was compelled to make. This was the only federal question made by either side during the trial in the district and supreme courts. The supreme court reversed the judgment without any reference to the question, and the issue is now out of the case.

The Water Works Company, to meet the evidence of the tax-paying plaintiffs, offered all the evidence indicated in the note of evidence found in the record, p. 77 *et seq.*

The act of 1833, incorporating the Commercial Bank; the notarial act by which the bank transferred the water works to the city; the city charter of 1870, and the existing charter of the city; the acts creating and defining the powers of the board of liquidation of the city debt; the notarial act of transfer and sale of the water works by the city to the defendant company, were put in evidence to show the exact relation of the city to the water works prior to the sale of the works to the defendant company, and to show further, that the sale of the works to the defendant company was for valuable and sufficient consideration, and contained full, minute and distinct warranty against all eviction or disturbance of possession, or interference with title, and with full warranty against municipal taxation by the city, and that the imposition and collection of municipal taxes, being entirely under the control of the city, to be exercised at its option, the levy and collection of a tax on the property of the defendant company, is not only a deliberate breach of the warranty of the city, but a fraud on its face, being in fact a demonstration that, in its greed to commit fraud, the city made haste to levy and collect a tax on property, one-fifth of which practi-

cally belonged to the city itself, as owner of that proportion of the share of the capital stock of the company.

The evidence of the witnesses, Houston and Gardner, was taken to show Toby to be mistaken as to the condition of pressure carried on the pipes and mains of the water works prior to the date of the contract assailed; compliance with the terms of the contract on the part of the defendant, and to show particularly by the deposition of Houston, that the allegation that the Water Works Company, as a corporation, promoted and procured the adoption of Act 56 of 1884, was untrue, demonstrating that if the act was promoted by any one, it was by Mr. Houston himself, as a citizen, to protect his own holding of the capital stock of the Water Works Company; to demonstrate that in assailing the defendant company, the city attacked and impaired the value of its own property and interest in the water works property, and that the effect of the adjustment of the disputes brought about by the execution of the contract assailed, was to advance the value of the 3920 shares of stock owned by the city from forty-six and forty-seven dollars per share to sixty dollars per share. That the effect of the rescission of that contract, by unappealable decree, will be to damage the city to the extent of $12 a share in depreciation on the entire 3920 shares. That the amount of money paid to the city for taxes since the execution of the contract is $84,232.34; the amount of dividends paid to the city since the execution of the contract, is $61,003.50; that taking the enhanced value of the city stock, and the enhanced dividends on that stock, resulting from the contract, in the settlement of the controversy, and the cash paid back into the city treasury, as taxes, the contract has been and is financially profitable to the city, even without taking into consideration the increased water supply and additional water pressure provided for in the contract, refuting the pretense made by the plaintiff taxpayers, that the contract was onerous and unprofitable to the city. Although we cannot comprehend how

the validity of this contract can be made dependent on the question whether it is a profitable or unprofitable contract, the defendant felt compelled to meet the position taken by the tax-payers as they were permitted to take it by the district judge, and to which he seems to have given weight, as if the question was actually involved in the controversy.

The attested copy of the bill of complaint in the case of the city of New Orleans vs. John A. Morris and others, No. 8643 of the docket of the United States Circuit Court for this district, was put in evidence as the judicial declaration of the city as to the condition of dilapidation of the city water works and city finances, compelling the sale of the water works to pay the city debt and to obtain any certain public water supply. The bill is the literature of the counsel for the tax-paying plaintiffs, representing them here, and is interesting reading, particularly when compared with the more recent literature in the petition in this cause. The bill is in the transcript (R. p. 125 *et seq.*), and sets out the history of the water works down to the date of the filing of the bill, and on page 126 is especially eloquent and truthful :

"That in the year 1877, the Legislature of the State of Louisiana, finding your oratrix in a bankrupt condition, her citizens impoverished, her taxable property enormously depreciated in value, harassed by her creditors and unable to pay the interest on her debt, and notably the interest on the bonds issued by your oratrix in the purchase of said water works, and unable to extend said water works as the exigencies of the city required, did, on the 31st day of March of said year, pass an act known as Act No. 33 of the extra session of 1877, and entitled, 'An Act to enable the city of New Orleans to promote the public health and to afford greater security against fire, by the establishment of a corporation to be entitled The New Orleans Water-Works Company ; to authorize the said company to issue bonds for the purpose of extending and improving said works, and to furnish the inhabitants of New Orleans an adequate supply of pure and wholesome water; to permit the holders of water works bonds to convert them into stock, and to provide for the liquidation of the bonded and floating debt of the city of New Orleans, as will more fully and at large appear from said act."

The report of Edwards, city administrator, in charge of the water works under the charter of 1870, brought up to the State Su-

preme Court in printed original, was given in evidence not only to show the dilapidated condition of the property when transferred by the city to the defendant company, but its unprofitable character while held by the city; and also that the expense of public water supply to the city, while it owned water works with the low pressure at that time carried on the mains, was far in excess of the price stipulated in the contract assailed in this suit, even without taking into consideration the amount returned to the city in the way of enhanced value of its stock, enhanced dividends and taxes; and to demonstrate that the unintermitting howl concerning the alleged extortionate character of the contract is humbug of the most transparent description, and in all things unwarranted by the facts.

It is probable that the question whether the contract assailed was wise or unwise, on the part of the city or the Water Works Company, is not involved in this controversy. If, however, the court should conclude otherwise, we insist upon all proof in the record relating to or bearing on that question, if the case reaches consideration on the merits.

The record of the tax suit of 1881, and the attested copies of the ordinance granting the right to residents of the city to lay pipes to the river and invade the grant made to the defendant company, as shown in the printed copies bound with the transcript, were introduced to show that the city had no sooner got rid of the water works and been relieved from two millions of its public debt, than it began the active breach of all the warranty clauses in the acts of conveyance to the defendant company and the guarantee of monopoly in the charter, as construed by the United States Supreme Court, in the case of Rivers vs. Water Works Company, in which the court held that the authority given Rivers to lay a pipe from St. Charles Hotel to the river was an invasion of the rights of the water works under its charter.

The relation between the Water Works Company and the city of New Orleans at the time of the execution of the contract

in question was strained, and liable at any moment to lead to the refusal of the defendant company to voluntarily furnish free water supply, in which event, the city would have been compelled to have become the plaintiff in litigation, that could not terminate until settled by the final decree of the Supreme Court of the United States under its construction of their rights under the charter, a course that, as events have shaped themselves, was probably the most advisable for the defendant company to have pursued, to insure the most speedy solution of the disputes and questions involved. The district judge, in accordance with his views indicated by his utterances and rulings during the trial, gave judgment against the defendant, filing a written opinion, to be found in the record, p. 148 *et seq.* The reasons for judgment are substantially that the contract depends for its validity on Act 56, of 1884. This act he finds to be "special law" for the benefit of the Water Works Company, and, in his opinion, a nullity, and therefore immaterial whether the defendant company accepted the act or not. For the invalidity of Act 56 he relies on Article 57 of the State Constitution, alse finding that if the act was operative, the defendant having, in his opinion, refused to waive the proviso contained in section five of the act, is not entitled to claim the act to be of any effect in law, either to sustain the contract or for any other purpose, not only because, with the proviso in the act, it is, in the opinion of the court, an act to release and extinguish, in whole or in part, indebtedness, etc., to the state or any municipal corporation, but would be equally repugnant to the constitution without the proviso; or if the defendant company had waived the proviso. As the district judge construed the act, it sought to release by its terms the defendant corporation from some obligation or debt due from it to the city, as he construes the contract between the city and the Water Works Company in its legislative charter.

The most subtle ingenuity can find, in Act 56, in so far as it

relates to this controversy, nothing but an enabling act, not intended to have any effect or operation except upon a single contingency, viz.: that the city, having the election in that respect, should voluntarily enforce or compel payment of a tax that it had solemnly bound itself not to impose or enforce.

If the city, having full volition in that particular, kept faith with its covenants and the contract with the state, and did not enforce or compel payment of any municipal tax, Act 56 was to stand as if it never had been written. If, on the other hand, the city saw fit to break its covenants and impose the tax, it was permitted to do so under the conditions named in the act.

It had full power to elect whether it would impose the tax or not. The Water Works Company is not given the slightest election or choice in the matter, nor is it given any authority to direct the city in its election as to whether Act 56 shall ever become operative as a rule of conduct for the city in its dealings with the Water Works Company. This being the case, it is difficult to comprehend how the district judge gave the act the construction necessary to sustain his decree.

The district judge having disposed of Act 56 as waste paper, then deals with Ordinance 909, and finds that this ordinance was enacted to carry out Act 56, already declared to have never been a law of any character. He concludes that Ordinance 909 is void, because Act 56 is void. No inquiry into the character of the powers of the city to ascertain whether the council had legislative power to make the contract complained of, irrespective of Act 56, is attempted beyond the general statement that the money paid under the contract is a gift or donation, and, as such, void. It is difficult to imagine or find any definition or description of legal gift or donation to cover this view of the case, even if there was not overwhelming proof that the real price paid for public water supply is far below the real value of the water supply, far below the expense and cost of the same public water supply to the city before the transfer of the works to the de-

fendant company, and that this is the case even when that amount is not reduced by the payment of annual taxes. The decree pronounced the contract and Ordinance 909 void, and Act 56 unconstitutional, decreeing injunction and costs as prayed for in the petition, (R. 152). The New Orleans Water Works Company *alone* appealed to the State Supreme Court from this decree.

The city never appealed from the decree, practically striking out its supplemental answer by refusing the admission of proof in its support, holding the city estopped, by its judicial confession contained in the first answer of general denial, of all errors and vices charged against its contract in the taxpayers' petition in the suit until after it had sued out its writ of error in this cause, and the cause was docketed in this court, when discovering that it had not invoked the highest court in the State having jurisdiction of the cause, it attempted to appeal on its own account to the State Supreme Court, where its appeal was dismissed on motion of the Water Works Company, for reasons set out in the opinion of the court reported as *Conery et al., vs. New Orleans Water Works Company et al., 42 La. An. 441.* The entire court concurring in the doctrine that where one party to a record appeals by motion in open court, all of the other parties become appellees and are bound by the result of the appeal. That when the cause was in the court on appeal from the final decree, the city made no complaint concerning the treatment of its amended answer, or the rejection of its testimony, and could not have another opportunity by a new appeal. If any writ of error lay to this court from this dismissal, none has been attempted.

The case on the appeal of the New Orleans Water Works Company had long before this time been heard in the Supreme Court of the State; the opinion is in the record, as well the majority opinion as the dissenting opinion of the two dissenting judges (Rec. 162, *et seq*). The opinions seem to have suf-

fered between the copyist and the printer, but are now reported under the title *Conery, Jr., et al. vs. Water Works Company et al., 41 An. 910.* The decree of the Civil District Court was reversed, the court declaring that the only question was whether the city had power to adopt Ordinance 909 and make the contract assailed, and held that the city under its charter had the power to make the contract independent of Act No. 56 of 1884, and that if it had not the power prior to the adoption of Act 56 of 1884, that act gave the power and is constitutional, and not void, as alleged by the taxpayers. That Act 56 was optional in character and could only be put in operation by the city itself; that the city having the power to make the contract, its wisdom or lack of wisdom, or whether it was a profitable or unprofitable contract, was not a question for either the comment or determination of the courts. The decree reversing the district court is to be found on page 194 of the printed record, rendered May 22, 1889. Under the practice, the appellees had six judicial days within which to apply for rehearing. On May 29th, 1889, they filed a petition for rehearing (Rec., 194). In this petition we hear for the first time any complaint of infraction of the Federal Constitution in a complaint that the determination that Act 56 of 1884 was valid and constitutional, and its interpretations by the court had impaired same contract in the charter of the water works contract to the injury of the city of New Orleans, "*the rights of the city in respect to said charter being private rights and not public rights, under the control of the legislative department of the government,*" whatever this formula means on filing this petition, Mr. Farrar, one of the counsel for the taxpayers, on the same day, suggesting grave public issues, applied for an extension of time to prepare a brief until the first Monday of the next term, November, 1889, and was allowed until September, 1889 for that purpose, a privilege of which he never availed himself, and on November 18, 1889, a rehearing was refused.

On the same day the city of New Orleans, on a petition

printed in the record, p. 196 *et seq.*, obtained from the dissenting Chief Justice a writ of error to this court. Afterwards the taxpayers, E. Conery, Jr., et al., applied for and obtained a second writ of error in the same cause, allowed by the same Chief Justice.

If the taxpayers represent the city of New Orleans (and they make no other claim) there are two writs of error by the same plaintiff in error, the one by the city as co-defendant with the Water Works Company in the court below, and the other by the city, as represented by the taxpayers, against the Water Works Company, and apparently against the city as co-defendant with the Water Works Company.

It is a noticeable fact that while the petition for the writ of error sued out by Shakespeare and the city of New Orleans contains a prayer for the allowance of a writ to both the mayor and the city, and the writ recites them both as plaintiffs in error, the writ was only perfected as to Shakespeare; Shakespeare alone gives any bond; at least there is no bond by the city in the record. The mayor is not the corporation, and the bond does not contemplate any obligation on the part of the municipal corporation itself, the mayor being absolutely without interest and against whom there seems to have never been any decree, for he, individually, never was cited in the case, or made party in any form. The writ of error would seem to be worthless and never efficient to bring the case into this court and would seem to leave the city where the State Supreme Court left it by its final decree, and in all things concluded by that undisturbed final decree.

We have made this full statement of the case in minute detail, because of the confused state of the record, and because many issues, perfectly immaterial to the proper determination of the real issues, were uselessly litigated to the marked confusion of the record.

We also call the attention of the court to the fact that the rea-

son that there appear no formal bills of exception is explained by a statute of Louisiana that dispenses with the necessity of formal bills of exception, giving the objections noted in the stenographer's report of the proceedings on the trial at *nisi prius* the effect of a formal bill signed by the judge; where the notes of *trial* show exception was taken to the ruling. Formal bills of exception in the Louisiana courts are a thing of the past.

LAW INVOLVED.

I.

The writs of error should be dismissed, both for irregularity and for want of jurisdiction.

The defendant in error renews its motion to dismiss, already before the court and undetermined.

The extraordinary character and form of the litigation, as well as unique procedure after the litigation was launched, presents several conundrums for preliminary solution.

1st. Who, in legal contemplation, was the real plaintiff in the court below? If the petition is taken as a guide, the taxpayers, E. Conery and his associates are plaintiffs, and all other parties, including the city of New Orleans, are defendants. But as the taxpayers have no such direct money interest, and particularly no pecuniary relation to the administration of the affairs of the city by which they could suffer loss or damage, any maladministration on the part of the city government cannot increase these taxes, for the reason that there is a constitutional limitation on the power of the city to tax for general purposes to ten mills on the dollar. (State Constitution, article 209).

The full limit of ten mills has always been imposed in New Orleans, and it is always claimed that the revenue at that rate is inadequate for proper general administration.

The taxpayer, being compelled to pay ten mills per annum, has no legal or pecuniary interest in the manner in which the

money (that ceases to be his property as soon as paid in) is disbursed by its new owner, nor is there any legal presumption that a taxpayer of 1887 will be a taxpayer during any subsequent year; death, removal or insolvency may dispose of his character or status.

The capacity of a taxpayer to sue as plaintiff, to control, affect or mix in municipal administration, is a comparatively new jurisprudence, and never obtained a footing in Louisiana until 1888. Without decent and proper restraints the doctrine will destroy all decent municipal administration, by allowing any taxpayer to take any administrative act through all of the courts. If taxpayers are allowed to assail the administration of counties and cities, it ought to be subject to the limitation that the act of administration assailed must be shown, on the face of the taxpayers' pleading, to be *ultra vires* or absolutely *void*, as contradistinguished from *voidable* acts or contracts, as any act of a corporation that is simply *voidable* may become a complete obligation as against all parties, even the taxpayers, by a simple exercise of municipal legislative action, or by the effect of *estoppel*, resulting from an act of municipal administration, *pendente lite*.

It must be that under any system of jurisprudence allowing taxpayers to sue to annul a corporate act of a city government, the taxpayer-plaintiff stands in the same relation to the corporation as a sueing shareholder in an ordinary corporation who is considered as acting for the corporation, because the corporation, either from fraud or negligence, refuses to sue or act in its own behalf. If this is the true doctrine, then E. Conery, Jr., *et al.*, taxpayer-plaintiffs in error, must in law be considered as suing out this writ of error *for the city of New Orleans*. The State Supreme Court in this case held this doctrine, as we believe, correctly.

2. By whom, and to review *what decree*, was the writ of error, docketed in this court as the writ of error of the city of

New Orleans, sued out? The petition for the writ is of course no part of the record, yet it is in the printed record, page 96 *et seq.*, and purports to be: "*The petition of the city of New Orleans, plaintiff in the cause above named and numbered, through the mayor, and of Joseph A. Shakspeare, mayor of said city.*" The title given the petition is "*Edward Conery, Jr., et als. vs. New Orleans Water Works Company et als., No. 10,334,*" and is signed; "*Jos. A. Shakspeare, Mayor City of New Orleans; Carleton Hunt, City Attorney; W. B. Summerville, Assistant City Attorney.*" Rec. 197 *et seq.* The order endorsed on the petition is: "*As prayed for, the writ allowed on bond of five hundred dollars.*

(*Signed*) *E. Bermudez, Chief Justice of the Supreme Court of Louisiana.*"

The writ of error lodged with the clerk of the supreme court, recites a suit with E. Conery, Jr., and all of the other taxpayers named individually "*and the city of New Orleans against the New Orleans Water Works Company.*" There never was such a suit with such plaintiffs against such single defendant in existence in any court on earth. The city of New Orleans in this action *was always a defendant in the record.* Joseph A. Shakspeare never was neither plaintiff or defendant in the cause in any capacity. The error complained of is recited to have been "*to the great damage of the city of New Orleans, and Joseph A. Shakspeare, mayor of said city.*" The writ in this form is endorsed "allowed," by the chief justice.

Then follows the bond, (R. 200). The only obligor on the bond, as contained in the record, is *Joseph A. Shakespeare, mayor of the city of New Orleans*, with Boffinger as surety. The bond runs "*to the said New Orleans Water Works Company and Edward Conery, Jr., et als,*" and bears even date with the *test* of the writ, and recites the suit to which it relates as a "*suit depending in the Supreme Court of the State of Louisiana,*" "*wherein the city of New Orleans is plaintiff and the New Orleans Water Works Company is defendant; judgment was rendered against the city of New Orleans,*

plaintiff." (There exist no such record or any suit with that title). The bond then recites: "*and the said Joseph A. Shakespeare, mayor, obtained a writ of error, etc.*"

"*Now the condition by the above obligation is such, that if the said Jos. A. Shakspeare, mayor of the city of New Orleans, shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, etc.*"

We ask, to whom does the writ attach as plaintiff in error, is it the writ of the city of New Orleans? If so, in what cause? Is it the writ of Joseph A. Shakespeare? If so, by what authority does a person, never made party to a suit, and individually and officially without pecuniary interest in the cause, intervene *after* final decree and sue out a writ of error?

If the writ was ever the writ of the city of New Orleans, it has apparently abandoned the writ by failure to furnish any bond necessary to vest the court with jurisdiction.

If the taxpayers and the city are identical in interest with each other and the city has allowed the decree of the Supreme Court below to become final and absolute as to itself, why are not the taxpayers also concluded by the action of the city? In other words, can the decree be closed from all review as to the city as a corporation and open to review to the taxpayers, who are only atoms making up in part the corporation itself? Such questions ought not to occur, but they are in this case nevertheless and must, it seems, be determined.

If the city is given absolution for all faults and errors in its procedure and the writ taken as effective so far as form alone is concerned, does it bring up anything revisable in this court under any circumstances? Of what judgment does the city complain in this court.

It was a defendant in the district court; so named in the petition, charged with fraud and collusion with the defendant in error, and answered separately (Rec. 13).

"And now comes Walter H. Rogers, city attorney for the city

of New Orleans, and for and in behalf of the city of New Orleans, and for all of the defendants except the (city) New Orleans Water Works Company, and reserving all and singular the exceptions pleaded herein, and in no manner waiving the same for answer to the said plaintiffs' petition in manner and form, as the same are set forth and continued in said petition, and prays judgment against the said plaintiffs' demand with costs.

(Note the word [city] in brackets has got into the plea through error in transcript or printing; it is not in the orignal).

This plea, which in Louisiana law was an affirmance of the contract and would have cured all defects rendering the contract *voidable*, only was filed May 27th, 1887, and remained the *only* plea of the city of New Orleans until November 23d, 1888, more than a year, when, without any notice to its co-defendant, the defendant in error, the city, on leave of the court, filed what is termed an "*amended and supplemental answer of city of New Orleans*" (Rec. 29).

In this paper the city set up its own alleged frauds or confessed itself to be guilty of all of the wrongs and frauds charged against it by the taxpayers, and prayed that Act 56, of 1884, ordinance No. 909, and the water works contract, be declared void and the contract annulled. The city from that moment stood on the record with double pleas; one in legal effect affirming the contract, another denying the validity of same contract; one plea praying judgment against the taxpayers, another plea praying judgment in favor of the same taxpayers, a sort of bedlam in pleading.

The question whether the city could by plea, both affirm and deny the validity of its contract and the precise effect of the plea of May 27, 1887, on the rights of the Water Works Company, would have been raised if the city had applied to the court for leave to withdraw the first plea. This was never done. There is under the procedure in Louisiana no demurrer to a plea or answer; the only remedy is to object to testimony in

support of illegal or insufficient pleas. This course was resorted to when the taxpayer plaintiffs had completed the production of testimony, the city attorney undertook to offer proof in alleged support of its last contradictory answer when, strange to say, the *counsel for the taxpayers* objected and levied war on their new recruit and deserter to their camp, on the ground "*that the amended answer, in response to which this testimony and evidence is offered, tends to change the issue in the case and upset the orderly conduct of the case as provided in the Code of Practice*" (Rec. 72, folio 144).

The New Orleans Water Works Company objected because of the estoppel by the first plea and its change of positions and pleas. The court sustained the objections of both plaintiff and defendant and refused to allow the city to assert the matters in its new plea, rejecting all testimony (Rec. 73). To this ruling the city excepted and saved an exception evidently with intention of appealing (Rec. 73). From this ruling, rejecting its new contradictory plea, the *city never appealed*, and it stands the undisturbed judgment of the Civil District Court to-day. The position of the city on this judgment of the trial judge was in legal effect its amended plea, was *thrown out of the case*, and it stood alone on its *first plea* of denial of the taxpayers' petition, and so it stands up to this moment.

The judgment of the district court overthrew both the original plea of the city and all of the pleas of the plaintiff in error by a general judgment in favor of the taxpayers (Rec. 152). The Water Works Company appealed. The city *did not* appeal and has never had any review of this ruling of the trial court, although the cause was appealable until the city lost the right of appeal by its own act.

Of what decision of the lower courts can the city now complain? If it complains of the judgment of the district court it has no writ of error, because it rested content with the decree

of that court, *not the court of highest resort*, for its case in the state where the case was tried.

If it complains of the judgment of the supreme court, on the only plea of the city, which the district court allowed to stand, then it complains of a decree sustaining the only plea of the city that ever went before the Supreme Court of the state for trial on the appeal by the Water Works Company. If the city did not intend to stand by the ruling demolishing its new plea, it should have appealed and obtained a reversal of the objectionable judgment of the *nisi prius* court on the subject of its somersault. It is too late now. Litigation for the city, so far as this court is concerned, ended with the unappealed decree or judgment of the *nisi prius* court.

The city being concluded as a corporation by its own action and plea, why are not E. Conery, Jr., and his forty-two associated taxpayers, at best but forty-three molecular atoms making up the mass of the corporation, concluded with the corporation. Can review be closed as to the corporation and open to particular and numerically insignificant atoms of the estopped corporation?

If there can be any doubt on the question that estoppel of the corporation is estoppel of all members or shareholders to the same extent as the corporation is estopped, it is one of the mysteries of this new jurisprudence allowing a taxpayer to indiscriminately attack the legislative and administrative action of a municipal corporation.

The writ allowed to E. Conery, Jr., and his taxpaying associates has little more regularity. If it is in law the writ of the city of New Orleans then the city has one more writ of error than the law allows to any other litigant in any single case, and its allowance by the Chief Justice of the state court was in excess of any power conferred on him in the matter of agency in allowing writs of that court.

If both writs must stand as regularly issued as far as form is

concerned, the writs were in fact and law unwarranted in this cause.

The writs both recite alleged wrongs or errors to the damage of the city of New Orleans, in alleged impairment of the alleged obligation of some alleged contract between the State of Louisiana and a political subdivision of its autonomy.

In order to support the writs it must appear not only that a contract of the character protected by the federal constitution lawfully existed, and that the state has, by some subsequent action as a state, either in form destroyed the contract or impaired its obligation, to the material injury or damage of the city of New Orleans, by some action of the state prohibited by the federal constitution, but that the city set up its supposed rights under the federal constitution in state court, and that right was practically denied or illegally disregarded by the lower court.

The city of New Orleans cannot pretend to be anything more than a political corporation to which has been delegated a *revocable* agency, for the local government of the territory of the parish of Orleans.

The state constitution of 1879, in force since that year, contains three articles relative to the city of New Orleans:

Art. 253. Provides that any city government that may be created within the limits of the city shall have the right to appoint its own officer and police pursuant to some mode or election, to be provided or prescribed by the state legislature.

"Art. 254. The General Assembly at its next session after the adoption of this constitution, shall enact such legislation as may be proper to liquidate the indebtedness of the city of New Orleans, and apply its assets to the satisfaction thereof. *It shall have authority to cancel the charter of said city and remit its inhabitants to another form of government if necessary.* In any such new form of government no salary shall exceed three thousand and five hundred dollars."

Art. 255 relates to the employment of crews of foreign vessels on work on wharves and levees in the city, and is immaterial.

New Orleans can therefore claim no guarantees against state legislation affecting or changing its municpal government and rights, excepting that it shall in some form be permitted to appoint its own officers.

ARGUMENT.

The plaintiff in error being a muncipal corporation, strictly political in character, can acquire no vested rights as a corporation in or by its charter. The legislature creating a municipal corporation can create and destroy at will, unless restrained by the state constitution. This was declared and settled in the cases of *Mount Pleasant vs. Beckwith, 100 U. S. 514; Barnes vs. District of Columbia, 91 U. S. 540; Laramie County vs. Albany County, 92 U. S. 397.*

In the last case cited, Justice Clifford, the organ of the court, held:

"That it is the settled doctrine that municipal corporations are under the entire control of the legislature from which their powers are derived; that their duties are all public and at all times subject to the will of the legislature, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact." 92 U. S. 310.

* * * "Institutions of the kind called counties and towns are the auxiliaries of the state in the important measures of municipal rule, and cannot have the least pretense to sustain their privileges or their existence upon anything like a contract between them and the legislature of the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are incompatible with everything of the nature of compact." 92 U. S. 311.

This has been without exception, so far as we can find, the doctrine of all state courts that have dealt with the question, and may be taken as the settled law, both state and federal.

Just what pretended contract between Louisiana and New Orleans has been, as it is claimed, altered or modified by any action of the state, is difficult to ascertain.

If it is the supposed contract contained in the 11th section of the water works charter, reading as follows:

"SECTION 11. *Be it further enacted, etc.*, That the city of New Orleans shall be allowed to use water from the pipes and plugs of said company, now laid or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets and charitable institutions, and that the said company shall place, free of any charge whatever, two hydrants of the most approved construction in front of each square where a main pipe shall be laid, at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets and cleansing the gutters, and for any other public purpose; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners. It shall be the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter; and in consideration thereof the franchise and property of said New Orleans Water Works Company, used in accordance with this act, shall be exempt from taxation—state, municipal and parochial," (subsequently amended so as to strike out exemption from state taxes), then, from the moment of acceptance of the charter by the city and the defendant in error, this section became and was a contract *between the city and the Water Works Company*, to which the state was no party beyond granting power to the city to make the contract. This contract the state has never interfered with. The Water Works Company faithfully performed its part of the obligation. The city deliberately broke the compact by levying and demanding a municipal tax, contrary to its covenant of exemption. This would seem to put an end of all claim by the city concerning any contract in the water works charter concerning public water supply broken or impaired by any act of the state to their prejudice. So far, the city has enjoyed a monopoly in breaking and destroying contracts for public water supply.

If it is claimed that Act 56 of 1884 (printed in full in the appendix), directed or compelled the city to make any new contract or convention with the Water Works Company by the

terms of the act, the contention is untrue; if the city desisted from imposing the tax, there was to be free water supply, as provided in section 11 of the charter. *Only* in the event of *imposing and collecting* a tax was the city required to pay the value of water used for public purposes.

The adoption of Ordinance 909 and the making of the contract assailed was the *voluntary act of the city of New Orleans*, acting for itself as a corporation competent to contract, and not the act of the state government, nor an act coerced or compelled by the State.

If the writs of error in this case were lawfully issued, their office, if effective, is to protect the city from the consequences of *its own covenants*, voluntarily entered into and relating to strictly public municipal service and operation as a city government while acting within the scope of its power, without resort to Act 56 of 1884, for any enlargement of its pre-existing authority.

If it was possible by any construction of the federal constitution to make that instrument apply to the internal political relation existing between a state and the subordinate municipal political corporation that the state may make and unmake at will, it is still necessary, in order to invoke the power of this court to renew the state court, that the right denied under the federal law or constitution should be set up in the state court, and that there should be a decision against the right or its equivalent in some form.

There is nothing in the record of any such right, either set up or decided against the city in any form.

The cause was tried on the taxpayers' petition; not one word of federal constitution or federal right is to be found in that voluminous document as filed. It never was amended to bring in any such issue. The pleading of the city when it abandoned its general issue and went over to the taxpayers, plaintiffs, (*R. 29 et seq.*) is but a rehash of the taxpayers' petition, without

setting up a single federal question or right. If it had done so, it would have been of no import; as that plea was *disposed of finally by the district court* without appeal to the Supreme Court, this court is only asked to review the State Supreme Court.

It was only after the final decree of the State Supreme Court, that the taxpayers in a *petition for rehearing* thought of any federal question (R. 194), when their counsel alleged that the opinion of the court, that Act 56 of 1884 was not repugnant to the *State Constitution*, had somehow impaired "*the obligations of the contract involved in the charter of the New Orleans Water Works Company, between the city of New Orleans and the Water Works Company, contrary to Section 10, Article 1, of the Constitution of the United States. The right of the city in respect to such charter being private rights, and not public rights, under the control of the legislative department of the Government.*

Connected with this is a curious averment that the State Supreme Court had cut the city out of some property that it is alleged the city had acquired in a case determined by the same court in the 36th Annual Report of its decisions "*without due process of law, contrary to the fourteenth amendment to the Constitution of the United States.*"

There is also a paper by the city, termed a petition for a writ of error (no part of the record), wherein it is erroneously averred that the city, in its last abandoned answer, set up some federal right as a municipal corporation, which the record of its plea demonstrates to be untrue in fact. It is perhaps immaterial what the paper does contain, as the city apparently never gave the bond necessary to make the writ allowed effective for any purpose.

None of this federal matter was ever set up or urged while the case was open, and seems to have been a desperate afterthought of counsel.

If, however, all of this matter had been serious and had been set up in time it would have been of no avail even if it had not

been *set up by a political corporation* without possible contract relation with its author, the state.

1st. Because, if any change was made in the contract relation between the city and the defendant in error, the change was effected by the act of the city itself in a *notarial contract*, and not by statute or the decree of any court.

2d. The Supreme Court of the state was not called on by the taxpayers or the city to pass on any federal question, but legitimately placed its judgment on the fact that the city made the contract assailed as her own free act of adminstration, with full *and competent power to make the contract a power conferred by the city charter, independently of the provisions of Act 56 of 1884*, in existence without that legislation, and that the Act 56 was not only not repugnant to the state constitution, but was permissive in character, the city alone being competent to give the act effect in contracting for public water supply; that without the action of the city the law would have been of no effect on any person or thing.

This ruling was sufficient to determine the cause without approach to any federal question, had such question been made or urged.

We insist that the writ of error allowed to the city and the Mayor (Shakespeare) was never perfected by bond as to the city and therefore abandoned, if ever of any force. That the supposed allowance to Shakespeare, mayor, was always a nullity, as neither Shakspeare or Guillotte, who was mayor, both when the contract was made and the suit brought, were ever made parties to the suit in any form; even formally Shakespeare stands as an intermeddler, making his first appearance in the record, in his extraordinary and volunteer application for a writ of error, with himself as plaintiff in the writ.

The only writ of error upon which the city depends for any review of the case is a nullity on its face, and should be disregarded.

We insist further, that the city, never having appealed from the decree of the district court disposing of its "*amended and supplemental answer*," has never been in a position to lawfully obtain a writ of error from this Court.

That under any view of the jurisprudence permitting taxpayers to sue, either as that jurisprudence exists in Louisiana or elsewhere, the taxpayer plaintiffs, Conery and others, can only claim to represent the municipal corporation they attempt to champion in suits of this character, that is a suit not questioning any exaction or tax sought to be enforced against them as individuals, and are *concluded when the corporation is concluded*, and for the same causes or reasons, and are barred by the same estoppels, in so far, at least, as *estoppels relate to* procedure in litigation, estoppel by record.

That when the city, as a corporation, became concluded by the decree of the State Supreme Court, and abandoned or lost all right of review as to the contract in litigation, if it ever had or might have had such right by proper procedure, every taxpaying atom in the mass of inhabitants making up that corporation was concluded as to any right to further litigate matters that had become *res judicata* between all of the actual contracting parties found in the contract assailed.

Therefore, as the record stands, the writ of error sued out by the taxpayers was always void on the face of the record to which it is attached and should be disregarded, even if there was a reviewable federal question in the record.

We respectfully submit authorities in support of the above propositions.

(1) Joseph A. Shakespeare, as mayor, cannot, under the city charter, stand in judgment or bring the city of New Orleans into any court by action in his name as mayor.

Section 1, City Charter, Act. No. 20, 1882; *Acts, 1882, 14.*

"Section 1. That all of the inhabitants of the parish of

Orleans, as now bounded" * * (statement of boundaries) "is hereby created a body corporate and established as a political corporation by the name of "the city of New Orleans," with the following powers, and no more:

It shall have a seal and may sue and be sued," etc.

The city of New Orleans is made a "judicial person," to act, contract, sue and be sued, by and in the corporate name alone, and has no trustee or *guardian ad litem*.

(2) "Writs of error to state courts have never been allowed as of right."

Mitchell vs. The Commonwealth, 7 *Wall.* 321.

"It is the duty of him to whom an application for such a writ is made to ascertain, from an examination of the record of the state court, whether any question cognizable here on appeal was made and decided in the proper court of the state, and whether the case, on the face of the record, will justify the allowance of the writ."

Spies vs. Illinois, 123 *U. S.* 131, 143.

(3) A petition for rehearing in a state court, after the decree complained of was made cannot, be invoked to support a federal writ of error.

Parmalee vs. Lawrence, 11 *Wall.* 36.

Butler vs. Gage, 138 *U. S.* 52.

(4) A petition for writ of error forms no part of the record below.

Clark vs. Pennsylvania, 128 *U. S.* 395.

Warfield vs. Chaffe, 91 *U. S.* 690.

Susquehanna Boom Co. vs. West Boom Co., 110 *U. S.* 57.

Manning vs. French, 133 *U. S.* 186.

Leper vs. Ugas, 139 *U. S.* 462.

(5) If there are two questions in this case—one federal and the other not—and it appears that the cause was decided in the state court upon the question not federal in character, there is no review on error, and this court may examine the opinion of the court to determine what point was decided.

Croply vs. New Orleans, 108 *U. S.* 105.

Cousin vs. Blane, 19 *How.* 202.

Adams County vs. Burlington R. R. Co., 112 *U. S.* 123.

Murdock vs. Memphis, 20 *Wall.* 590.

Jenkins vs. Leowenthal, 110 *U. S.* 222.

Hade vs. Akers, 132 *U. S.* 554.

Johnson vs. Risk, 137 *U. S.* 300.

(6) Where the Supreme Court of a state decides against the plaintiff in error on an independent ground, not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question.

Hopkins vs. McLure, 133 *U. S.* 380.

Beatty vs Benton, 135 *U. S.* 244.

San Francisco vs. Itrell, 133 *U. S.* 65.

Marran vs. Bunkley, 129 *U. S.* 178.

(7) In error to a state court, this court acting only on the record, it is essential that the record not only show that the right, immunity, etc., was set up or claimed in the court below, but that the decision of the court was against the right set up or claimed in the action.

Clark vs. Pennsylvania, 128 *U. S.* 395.

Warfield vs. Chaffe, 91 *U. S.* 690.

Susquehanna Boom Co. vs. West Branch Boom Co., 110 *U. S.* 57.

"It is a well settled rule, limiting the jurisdiction of this court in such cases, that where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the court did in fact base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one.

"And it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided,

or that the judgment as rendered could not be given without deciding it."

Klinger vs. Missouri, 13 *Wall.* 257-263.

De Saussure vs. Gaillard, 127 *U. S.* 216-233.

Brown vs. Atwell, 92 *U. S.* 327.

Citizens' Bank vs. Board of Liquidation, 98 *U. S.* 140.

Choteau vs. Gibson, 111 *U. S.* 200.

Adams Co. vs. Railroad, 112 *U. S.* 123.

Detroit City R. R. vs. Guthard, 114 *U. S.* 133.

New Orleans Water Works Co. vs. La. Sugar Refinery Co., 125 *U. S.* 18.

Kreiger vs. R. R. Co., 125 *U. S.* 39.

Lehigh Water Co. vs. Euston, 125 *U. S.* 388.

Wood Machine Co. vs. Skinner, 139 *U. S.* 298.

Cook County vs. Canal Co., 138 *U. S.* 635.

Leper vs. Texas, 139 *U. S.* 462.

(8) The constitutional provision in the federal constitution, prohibiting impairment of contracts by states, was never intended to interfere with the relation of a state to its own municipal political corporations, in the matter of internal or local administration of public matters, as between the state and such corporation. The relation is political, not conventional, or contractual in the absence of restriction in the state constitution, the state can, at will, enlarge contract or take away all power and administration from its chartered cities.

Mount Pleasant vs. Beckwith, 100 U. S. 514; Barnes vs. District of Columbia, 91 U. S. 540; Lamarie County vs. Albany County, 92 U. S. 307.

In this case Justice Clifford, the organ of the court, held: "that it is the settled doctrine that municipal corporations are under the entire control of the legislature from which their powers are derived; that their duties are all public and at all times subject to the will of the legislature, 'and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible

with everything of the nature of compact.'" 92 U. S. 310.

* * * "Institutions of the kind called counties and towns are the auxiliaries of the state in the important business of municipal rule, and cannot have the least pretense to sustain their priviliges or their existence upon anything like a contract between them and the legislature of the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are incompatible with everything of the nature of compact. 92 U. S. 311.

U. S. vs. B. & O. R. R. Co., 17 Wall. 322; Rogers vs. Burlington, 3 Wall. 654; Bank of Ohio vs. Knoop, 16 How. 369; Bissell vs. Jeffersonville, 24 How. 287; La. State Const., Art. 254; New Orleans vs. Clark, 95 U. S. 644, 654.

(9) That any pretense or violation of the XIV Amendment by the State of Louisiana or its Supreme Court, does not merit notice if the city of New Orleans has been deprived of any property or right in any state, or judicial contract concerning public water supply; it was by the operation of its own contract now sought to be annulled, and not by the action of the state or its courts. The federal constitution never was intended to protect contracts or contract rights from change or impairment by voluntary contract, variation or alteration, by the will of the contracting parties, or to insure against alleged indiscreet bargaining between parties competent to contract.

ON THE MERITS.

If the court shall find that there is any lawful writ, lawfully issued in this cause, requiring a consideration of the merits, we are unable to make any stronger presentation of the case than is contained in the majority opinion of the State Supreme Court, as contained in the record, but more correctly reported in *41 La. An. 910.* Under the doctrine, in *Fairchild vs. County of Galatin, 100 U. S. 47,* the determination that Act 56 of 1884 and the construction given the act would seem to be conclusive on this court.

We only add authorities in support of the doctrine laid down

by the state court in its determination of the cause, against the plaintiff below:

Every municipal corporation has all of the power of administration of local municipal affairs expressly granted in its charter, and all incidental powers necessary to carry such powers into execution and effect and operation.

Dillon on Mun, Cor., 3d Edition, Section 94, *Vol.* 1, 121.
Railroad vs. Evansville, 18 *Wis.* 83.
Slack vs. Railroad Company, B. Mon. 1.
Bridgeport vs. R. R. Co. 15 *Con.* 475, 501,
Cases cited in note, 3d Ed. Dillon on Mun. Cor., Vol. 1, *p.* 121.

A municipal corporation, with power to sue and be sued, has authority to settle its contentions by compromise. This right also grows out of its authority to create debts and incur liabilities.

Dillon on Mun. Corp. §398.
Bean vs. Jay, 23 *Maine* 117, 121.
Meech vs. Buffalo, 29 *N. Y.* 198.
Baileyville vs. Lowell, 20 *Maine*, 178.
Nelson vs. Milford, 7 *Pick.* 18.
Augusta vs. Leadbeater, 16 *Maine*, 25.
People vs. Supervisors, 27 *Cal.* 655.
People vs. Coon, 25 *Cal.* 648.
Melville vs. Dixfield, 30 *Maine*, 157.
Petersburg vs. Maffin, 14 *Ill.* 193.
Taylor on Corp. 137.
Oglesby vs. Attrill, 105 *U. S.* 605.
St. Louis vs. United States, 92 *U. S.* 462.
Oliver vs. Worcester, 102 *Mass.* 489.
Board of Liquidation vs. R. R. Co. 109 *U. S.* 221.
Buffalo vs. Bettinger, 76 *N. Y.* 393.

A municipal corporation, having the powers conferred on it in the form and to the extent conferred on the city of New Orleans by its charter of 1882, particularly in the seventh section thereof, and also having a general authority to make all contracts necesary for the health, safety and welfare of the city, *may contract for water works.*

Cabot vs. Rome, 28 *Ga.* 50.
Wells vs. Atlanta, 43 *Ga.* 67.
Livingston vs. Pippin, 31 *Ala.* 542.
City of Vincennes vs. Callender, 86 *Ind.* 484.

To authorize a taxpayer to stand as plaintiff in a suit having for its object the rescission of a contract made by a municipal corporation, the plaintiff must not only show that he is a

taxpayer, but set forth and disclose in his petition a state of facts, which, if true, render the contract assailed absolutely *void*, not simply *voidable*.

People vs. Mayor, etc., of Brooklyn, 4 *Const.* 419.
Dillon on M. C., § 55.
Spaulding vs. Lowell, 23 *Pet.* 71.
Hodge vs. Buffalo, 2 *Denio*, 110.
Smith vs. Madison, 7 *Ind.* 86.
Kyle vs. Malin, 7 *Ind.* 34-37.
Livingston vs. Pippin, 31 *Ala.* 515.
Mayor vs. Cabot, 28 *Ga. Rep.* 50.
Wells vs. Atlanta, 43 *Ga. Rep.* 76.
City of Vincennes vs. Callender, 86 *Ind.* 494.
Valparaiso vs. Gardner, 97 *Ind.* 2.
Jones vs. Richmond, 18 *Grattan Va.* 517.
Smith vs. Richmond, 15 *Wall.* 429.
Willard vs. Newburyport, 12 *Pick.* 229.
Kelsey vs. King, 1 *Trans. App.* 133.

Where there is a corporate body in existenc with municipal and political powers, the municipal name and authority is adequate to perform all functions relating to enforcing the ordinances and maintaining the rights of the corporation. There must be inability or refusal to perform that duty and functions before the duty can be either assumed or performed by volunteers.

Russell vs. Wakefield Water Works Co., *L. R.* 20, *Eq.* 179.
Gray vs. Lewis, *L. R.* 8, *Ch.* 1035.
Hersee vs. Vesey, 24 *Maine*, 9.
Lofond vs. Deems, 81 *N. Y.* 507.

To authorize courts to reverse the legislative decision manifested by the passage of an act as to what is a city purpose, the case must be one conclusively showing an underlying purpose different from municipal use and convenience.

Re Appleton vs. Mayor, 99 *N. Y.* 569.
Brooklyn Bridge Case—People vs. Kelly, 76 *N. Y.* 475.
Matter of Lands in The Town of Flatbush, 60 *N. Y.* 398.

Where the law or charter confers upon the City Council or local legislature power to determine upon the expediency or necessity of measures relating to the local government, their judgment upon matters thus committed to them, while acting within the scope of their authority, cannot be controlled by the courts.

Dillon on Mun. Corp., *3d ed.*, *Vol.* 1, 121.
Baker vs. Boston, 12 *Pick.* 184.
Honey vs. Mayo, 41 *Maine*, 322.

Parks vs. Boston, 8 *Pick.* 248.
Fay, ex parte, 15 *Pick.* 243.
Donnelly vs. Cabaniss, 52 *Ga.* 211.
Sheridan vs. Colvin, 78 *Ill.* 327.
Motz vs. Detroit, 18 *Mich.* 495, 516.
Bond vs. Mayor of Newark, 18 N. *J. Eq. Rep.* 376.
Rittenhouse vs. Mayor of Baltimore, 25 *Md.* 336.
Jones vs. Richmond, 18 *Gratt.* 517.

The motives or business prudence of any body vested with legislative capacity cannot be enquired into by the courts.

Dillon on Mun. Corp., 3d ed., Vol. 1, *p.* 326.
Baird vs. New York, 96 *N. Y.* 567, 580, 581.
People vs. Alberton, 55 *N. Y.* 50.
People vs. Draper, 55 *N.* Y. 532.
Mayor vs. Bank, 111 *N. Y.* 446, 458.
Wells vs. Atlanta, 43 *Ga.* 67.
Ex parte Delaney, 43 *Cal.* 478.

A municipal corporation cannot relieve itself of its contract obligations, or refuse to perform a contract made by its officers or agents, because such officers or agents have been unfaithful in other matters.

Baird vs. Mayor of New York, 96 *N. Y.* 567 (*one of the Tweed cases*).

Any consideration that will make a valuable consideration for a contract between individuals will constitute a valid consideration in a contract by or with a municipal corporation. A moral obligation alone is sufficient to support a promise of a municipal corporation, if sufficient to support a promise, if the same state of things existed between individuals.

Gilford vs. Supervisors, 13 *N. Y.* (3 *Kern*) 149.

Same case, 24 *Wend. and* 18 *Barb.* 615.
Dillon on Mun. Cor., § 44.
Brewster vs. Syracuse, 19 *N. Y.* 116.
People vs. Mayor, etc. of Brooklyn, 4 *Const.* 419.
Thomas vs. Leland, 24 *Wend.* 65.
Shelby County vs. Railroad Company, 5 *Bush.* (*Ky.*) 225.
Philadelphia vs. Field, 58 *Pa. St.* 320.
Cooley on Constitutional Limitations, 380, 491.
Blanding vs. Burr, 13 *Cal.* 343.
People vs. Omondaga, 16 *Mich.* 254.
Lycoming vs. Union, 15 *Pa. St.* 166.
Nelson vs. Milford, 7 *Pick.* 18.
Pike vs. Middleton, 12 *N. H.* 281.
Briggs vs. Whipple, 6 *Vt.* 95.
Mayor vs. Tenth National Bank, 111 N. *Y.* 446, 449.
Brown vs. Mayor, 63 *N. Y.* 164.

An estoppel is an admission, or something which the law treats as equivalent to an admission, of a high and conclusive nature—so high and so conclusive that the party whom it affects is not permitted to aver against it, or offer evidence to controvert it, and binds not only the party, but all privies.

2 *Smith's Leading Cases*, 580, *and notes on Duchess of Kingston's case.*
1 *Herman on Estop.* 150.

Privies bound by estoppel are, first, privies in blood; second, privies in law; third, privies by estate. The taxpayers, plaintiffs in this suit, are privies both in law and estate. They are privies *quoad* the city of New Orleans, because they are atoms of the corporation, whose officers are their special agents in all matters of municipal administration; privies in estate, in that the alleged remedial action sought by them is simply alleged pecuniary advantage to and for the city of New Orleans as a political corporation aggregate.

2 *Smith's Leading Cases* (*Note on Duchess of Kingston's case*). 587-589 *et seq.*
1 *Herman on Estoppel, ed.* 1886, 149 *et seq.*
1 *Dillon on Mun. Cor., p.* 116 *and secs.* 90-91.

If a party to a contract desires to rescind on the ground of fraud or mistake he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he is silent, and treats the contract as valid, he waives his objections, and is as conclusively bound by the contract as if the mistake or fraud had not occurred. *He is estopped by election.*

If he has the right to repudiate or affirm the transaction, and affirms it, he cannot afterwards resort to his right of repudiation.

Herman on Estoppel, Ed. 1886, *Vol.* 2, *pp.* 1171, 1172.
Grymes vs. Saunders, 93 *U. S.* 55.
Thomas vs. Barstow, 48 *N. Y.* 200.
Flint vs. Wood, 9 *Hare*, 622.
Jennings vs. Broughton, 5 *DeG. M. and G.* 139.
Loyd vs. Brewster, 4 *Paige*, 537.
R. R. Co. vs. Rowe, 24 *Wend.* 74.
Minturn vs. Main, 7 *N. Y.* 220.
Wroten vs. Armat, 31 *Gratt.* 228.
Frinck vs. Hollander, 35 *An.* 582.
Trustees vs. Sterrett, 31 *An.* 719.
O'Keefe vs. Handy, 31 *An.* 832.
Lippmins vs. McCranie, 30 *La. An.* 1251.

Byrne vs, National Bank, 31 *An.* 81.
Ins. Co. vs. DeBlanc, 31 *An.* 100.
School Directors vs. Hernandez, 31 *An.* 158.
Levee Company vs. State, 31 *An.* 250.
Hardee vs. Turner, 31 *An.* 469.
Hood vs. Frelsen, 31 *An.* 577.
In Re Mechanics' Society, 31 *An.* 627.
Succession of Fluker, 32 *An.* 292.
Hart vs. Haguet, 33 *An.* 362.
Bank vs. Wagner, 33 *An.* 732.
Dickson vs. Dickson, 33 *An.* 1370.
Succession of Hoss, 33 *An.* 1256.
Maguire vs. Maguire, 40 *An.* 579.

A party to a suit cannot, in judicial proceedings, allege one state of facts as a cause of action or defense, and in the same suit, or in a suit about the same controversy or thing, between the same parties, set up and plead a state of facts so contrary and inconsistent, that, if one plea or allegation is true, the other is necessarily false.

Walker vs. Walker, 37 *An.* 107.
Gaudet vs. Gauthreaux, 40 *An.* 186.
State vs. Judges, etc., 34 *An.* 1220.
Brandon vs. Allen, 28 *An.* 60.
State vs. Board of Liquidation, 28 A. 121.
Bender vs. Belknap, 23 *An.* 764.
Serrit vs. Labouse, 15 *An.* 186.
Osborne vs. Legras, 29 *An.* 291.

The doctrine of estoppel applies to the state and municipal corporations, as well as to private citizens, or individuals.

State vs. Ober, 34 *An.* 559.
State vs. Taylor, 28 *An.* 460.
Moore vs. New Orleans, 32 *An.* 726.

We respectfully submit that if it be determined that this cause has been lawfully brought to this court for review the decree of the State Supreme Court is correct and should be affirmed.

J. R. BECKWITH,
Counsel for New Orleans Water Works Company, Defendant in Error.

APPENDIX A.

No. 56.] AN ACT

To provide for the supply of water to the city of New Orleans, by the New Orleans Water Works Company, in cases of the municipal taxation of said company; to authorize provision to be made for the payment of water supplied and to be supplied; to provide for obtaining a supply of clear or filtered water by the New Orleans Water Works Company, and to enable the city of New Orleans to contract for the same; to regulate the payment of taxes imposed on said company contrary to the exemption given in its charter and to put into effect section 11 of act No 33 of acts of 1877, E. S., in instances of refusing or contrary to the exemption therein.

Whereas, Due notice and advertisement has been given and made of the intention to apply for this act, pursuant to article 48 of the constitution of this state; and

Whereas, The New Orleans Water Works Company is being subjected to municipal taxation notwithstanding the exemption from taxation granted by its charter in consideration of water to be supplied to the city of New Orleans; and

Whereas, It is possible and desirable to furnish the inhabitants of New Orleans with clear or filtered water from the Mississippi river; therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That in all instances of the taxation of the franchises of property of the New Orleans Water Works Company for any year or years, by or for the city of New Orleans, or for municipal purposes, whether such taxation be for past or future years, and the said company be in any manner obliged to pay, notwithstanding the exemption granted in section 11 of act No. 33 of acts of 1877, E. S., then in all such instances, the said city of New Orleans is hereby empowered and required to pay the said company the value of all the water the said company has supplied or shall supply, during any year or years for which said taxes have been or shall be levied, to or for the use and purposes of the city of New Orleans, its public buildings, markets, or for streets, gutters, extinguishment of fires, or other public purposes.

SEC. 2. *Be it further enacted, etc.*, That in all instances of such taxation, contrary to said exemption, or any future year or years, the city of New Orleans shall provide in its budget, or shall set apart and appropriate a sum sufficient to pay for the said water supply for said year or years, and unless this be observed and done, the said company shall not be compelled to deliver water for the uses and purposes aforesaid.

SEC. 3. *Be it further enacted, etc.*, That any taxes already imposed for any year, contrary to said exemptions, shall not be exacted, nor any penalty or interest accrued be demanded thereon, or any begin to run until said city shall have provided for the payment of the water supplied in said year, or provision made therefor by remedy at law or equity.

SEC. 4. *Be it further enacted, etc.*, That to secure the inhabitants of New Orleans and to the use of the city a supply of filtered or clear water, the city of New Orleans be and is hereby empowered to contract with the said company, and determine upon terms and conditions, and fix a price for obtaining from said company such supply of clear or filtered water.

SEC. 5. *Be it further enacted, etc.*, That nothing in this act shall be construed as in any manner abridging or otherwise affecting any of the rights, franchises and privileges heretofore granted to said company; but all such rights, franchises and privileges shall continue and belong to said company.

SEC. 6. *Be it further enacted, etc.*, That all laws or parts of laws inconsistent herewith be and are hereby repealed, and this act shall have effect from and after its promulgation.

Approved 7th July, 1884.

H. W. OGDEN,
Speaker of the House of Representatives.
CLAY KNOBLOCH,
Lieutenant-Governor and President of the Senate.
S. D. McENERY,
Governor of the State of Louisiana.

A true copy from the original:
OSCAR ARROYO,
Secretary of State.

APPENDIX B.

STATE OF LOUISIANA,
Parish of Orleans,
City of New Orleans.

Be it known, that on this third day of the month of October, in the year of our Lord one thousand eight hundred and eighty-four and of the independence of the United States of America the one hundred and ninth.

Before me, Joseph Dewey Taylor, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and official nofary of the city of New Orleans, and in the presence of the witnesses hereinafter named and undersigned--

Personally came and appeared the Honorable Joseph Valsin Guillotte, mayor of the city of New Orleans, herein acting in his official capacity as mayor aforesaid, being herein and hereunto specially authorized and empowered by ordinance number 909, council series, adopted by the council of the city of New Orleans on the 23d day of September, A. D. 1884, a duly certified copy of which ordinance is hereto annexed and made part hereof.

Also came and appeared Mr. Albert Baldwin, president of and herein representing the New Orleans Water Works Company, being herein and hereunto specially authorized and empowered by a resolution of the board of directors of said water works company, passed at a meeting of said board held in the city of New Orleans on the 27th day of September, A. D. 1884, a certified copy of which resolution is hereto annexed and made part hereof.

Whereupon said Albert Baldwin, in his said capacity as president, declared and does hereby declare that he accepts, all and singular, the terms, conditions, provisions, obligations, rights, benefits and advantages set forth and contained in said ordinance No. 909, adopted by the council of the city of New Orleans, on the 23d day of September, A. D. 1884, and approved by mayor on the 26th day of September, A. D. 1884, thereupon duly promulgated, and which said ordinance, so accepted by said Baldwin, president, in the words and figures following, to-wit:

An ordinance to carry out act No. 56 of the acts of 1884, providing for a future water supply from the New Orleans Water Works Company, to and for the city of New Orleans and certain institutions, and regulating the use of water and the payment therefor.

Whereas, The city of New Orleans has been, and is and will be unable to allow the New Orleans Water Works Company the fifty years' exemption from taxation, being the consideration for a free supply of water, contemplated by section 11 of act No. 33 of the acts of 1877; and the courts having decided that the exemption from municipal taxation granted in said act is not, and shall not be enjoyed, and therefore, as is also decided, that the city must pay for the water supplied by said company; and

Whereas, it is best to arrange for a fixed annual price for said water supply, rather than leave the city liable to an annual demand, the amount of which cannot be known in advance, and from which the city cannot be relieved, but is specially authorized and required to provide for the payment therefor; and

Whereas, the said New Orleans Water Works Company is willing to accept terms, arranging for a sum to be determined in advance of each year, and which amount can be readily and equitably fixed, according to a mode adopted in other cities, by reference to the number of fire hydrants, fire plugs or fire wells, now numbering eleven hundred and thirty-nine (1139) in this city; therefore,

SECTION 1. Be it ordained by the city council of the city of New Orleans, that during the term of the charter of the New Orleans Water Works Company, beginning with the year 1885, the supply of water for which this ordinance provides shall be furnished by the said company from the pipes and plugs of said company, now laid or hereafter to be laid, for the following purposes, to wit: For the extinguishment of fires and the cleansing of the gutters; for the use of all existing public buildings, public markets, public squares and places, public schools and the public charitable institutions supported and to be established and supported by the state or city, and now supplied by the said company; it shall be the duty of said company to keep and maintain a head or pressure of water of not less than fifty feet head between the hours of 7 a. m. and 6 p. m.; and the reservoir supply at night and between the hours shall be of such abundance as amply to cover the needs of the fire department for extinguishing fires; and said company shall make such provision as may be necessary to reinforce or supplement said reservoir supply in case of need or accident. In consideration for such supply the city of New Orleans shall pay, during the term of said company's charter, to the said New Orleans Water Works Company, sixty (60) dollars per annum for each and every fire plug, fire hydrant and fire well connected with the mains or pipes of said company, of which said fire plugs, fire hydrants and fire wells there are now eleven hundred and thirty-nine (1139), which number shall be the least number of the annual sum to be paid to said company, and for every additional hydrant, fire plug or fire well exceeding said number, hereafter attached to said pipes or mains, the city shall pay an additional sixty ($60) per annum.

SEC. 2. Be it further ordained, etc., That the city of New Orleans shall have the power, in time of drought, to furnish water to such persons as may live outside the lines (of) the pipes of said Water Works Company free from all charges by the same, and shall have further power, by ordinance duly passed and notified in writing to said company, before each annual appropriation for such supply, to decrease or increase the number of fire plugs, fire hydrants and fire wells for the ensuing year, all such ordinances to designate the locations for the new attachments or intended cut-offs; provided, however, that the number of said fire hydrants, fire plugs and fire wells be not reduced below eleven hundred and thirty-nine (1139), the intent thereof being that the annual price to be paid for said water supply shall never be less than as fixed herein, by reference to the now existing number of said fire plugs, fire hydrants and fire wells; but the city expressly reserves the power to change the location of any and all of said fire plugs, hydrants or wells whenever the council shall deem it necessary, said changes to be at the cost of the company.

SEC. 3. Be it further ordained, etc., That the city of New Orleans shall annually set apart, appropriate and provide in its annual budgets of expenditures and receipts, beginning with those for the year 1885, and in all successive budgets for each year successively, a sum sufficient to pay for said annual water supply, as fixed in the foregoing sections of this ordinance; and that said annual sum or price shall be paid to said New Orleans Water Works Company, in twelve equal and monthly installments, one on the last day of each consecutive month, beginning in the month of January, 1885, for the year 1885; and beginning also in the month of January in each year thereafter, and in event of prompt cash payments of said installments during each year the city of New Orleans shall be entitled to deduct and retain from the last installment in each year six per centum of the entire amount paid and payable to the said company in and for said year; but should any installment be unpaid when due it shall bear interest at the rate of eight per centum per annum from the end of the month in which it was payable until finally paid.

SEC. 4. Be it further ordained, etc., That it is hereby made the duty of the comptroller or auditing officer, and of the treasurer of said city of New Orleans, carefully to set apart and keep, as a distinct fund, the moneys or collections which shall have been appropriated in each year, pursuant to this ordinance, and such proportion of all collections of the revenue as shall have been appropriated in the budgets to and for said company, or the said water supply for each year shall be carefully and exactly set apart by said officers as collected, and shall be warranted for by said comptroller and paid by said treasurer to said company, during each month, without further direction, ordinance or authority than that hereby given.

SEC. 5. Be it further ordained, etc., That the New Orleans Water Works Company shall have the right to inspect and to examine into the use of water to be supplied under this ordinance, and the city of New Orleans and its officers shall see that no water is taken or used except for the purpose aforesaid, and that there shall be no waste nor more water taken and used than may be actually necessary for the purposes aforesaid; and to this end the city of New Orleans shall adopt all proper measures or ordinances to prevent waste and to prevent any use of water except for the purposes herein designated; and it is hereby made the duty of the officers of said city, and of those of any and all public buildings and public institutions, and of all persons using water under this ordinance, to prevent waste and to prevent the use of such water except for the actual need for the purposes aforesaid.

SEC. 6. Be it further ordained, etc., That the mayor be and is hereby authorized and directed to execute a contract by notarial act, to and with said company, embodying and carrying out the provisions of this contract.

Sec. 7. Be it further ordained, etc., That all ordinances or parts of ordinances inconsistent or in conflict with this ordinance be and the same are hereby repealed.

Adopted by the council of the city of New Orleans, September 23d, 1884.

M. MCNAMARA,
Clerk of Council.

Approved September 26, 1884.

J. V. GUILLOTTE, *Mayor.*

A true copy:

TH. BUISSON,
Secretary to the Mayor.

And said Joseph Valsin Guillotte, mayor, and said Albert Baldwin, president, having each read and declared himself fully cognizant of the contents of said ordinance, do severally declare that they do hereby contract, engage and agree, one with the other, according to the terms, provisions, conditions and language of said ordinance, all and singular of which said terms, conditions, provisions and language shall be and is hereby made a contract engagement and agreement between said parties, the city of New Orleans and the New Orleans Water Works Company, to be observed and carried out, and held and maintained inviolate during the entire term and existence of the said New Orleans Water Works Company, its assigns or successors as now fixed in the charter of said company, being a period of fifty years from the incorporation of said company.

The said Albert Baldwin, as president aforesaid, engages to furnish and supply water from the pipes of said company in the

manner, at the times and for all purposes and objects as set forth in and pursuant to the provisions and requirements of the said ordinance No. 909, council series; to furnish or supply water to and for the public places, buildings and institutions, as in and by said ordinance required; to allow the city of New Orleans in time of drouth, said state or condition of drouth to be decided by the board of this company and the city council, to furnish water to such persons as may live outside the lines of the pipes of the said company for the needs of said persons, without waste and by such means of transportation by carts, wagons, barrels or like appliances as said city may provide and furnish, all pursuant to the intent and purposes of sections second and fifth of said ordinance; to observe and obey any ordinance duly notified to said company directing the increase of the number of fire plugs, fire hydrants and fire wells or the decrease thereof, provided said decrease be and not below eleven hundred and thirty-nine (1139) in number, all according to section third of said ordinance; and further, he engages and contracts, as president aforesaid, to do, perform and give and to observe, carry out and fulfil all things required of said company by or in said ordinance.

In consideration whereof, said Joseph Valsin Guillote, mayor aforesaid, engages and contracts to pay unto said company, annually, the sum of *sixty (60) dollars* for each and every fire plug, fire hydrant and well connected with the mains or pipes of said company, of which there are now *eleven hundred and thirty-nine (1139)*, and which number shall ever be the least measure of the annual sum to be paid said company; to pay said company annually *sixty (60) dollars* for every additional hydrant, fire well or plug, exceeding said number of eleven hundred and thirty-nine (1139), and hereafter attached to said mains or pipes; to notify said company in writing of all decrease or increase required of said hydrants or wells; to make promptly, fully and specially, the annual appropriations and monthly payments as required by and in section three of said ordinance, the city to deduct or retain from the last monthly payment in each year six per centum of each annual sum paid and to be paid said company as provided in said section three; to hold and set apart and keep as a distinct fund the moneys or collections as required by said ordinance, and upon request or demand of said company, on the last day of each month in any year, the comptroller of the city shall warrant on the treasurer for and the treasurer shall pay from said moneys or collections, the installments which at that time shall be due, without other authority or ordinance than said ordinance, and the comptroller or auditing officer and the treasurer of the city shall faithfully carry out and promptly obey all the requirements and provisions of the fourth section of said ordinance, and shall raise no obstacle nor impose any delay in obeying the same; and it shall be the duty of each, in his respective department, to keep all money and collections appropriated under said ordinance and

this contract, as separate from all other moneys, and as a distinct fund; all pursuant to and in accordance with said section four.

The said company shall have the right to inspect and to examine into and concerning the use of water supplied by it, and none of said water shall be wasted or used otherwise than for the purposes named in said ordinance and to the extent of the actual need for said purposes, all as provided in section five of said ordinance; and to this end the officers and persons designated in said section five and the city of New Orleans shall do, perform and abstain from doing the things set forth in said section five of said ordinance.

Further, it is agreed, understood and stated by and between the said parties, that the specification or detailing in this instrument of the several rights, duties, obligations and things to be done, performed, observed, carried out or abstained from respectively, does not and shall not limit, modify or in any manner take from the effect of any of the terms, conditions, provisions or expressions of said ordinance, all of which are, by these presents, accepted and made binding, effective and operative upon and between the said New Orleans Water Works Company and the city of New Orleans, their assigns or successors, for and during the term named in the charter of said company.

Thus done and passed in my office in the city of New Orleans aforesaid, the day, month and year aforesaid, in the presence of Charles G. Rebentisch and Geo. R. Goetz, witnesses of lawful age, residing in this parish, who have signed their names with said parties and me, notary, after due reading of the whole.

Original signed:

J. V. GUILLOTTE, *Mayor.*
ALBERT BALDWIN,
President N. O. Water Works Co.
C. G. REBENTISCH,
GEO. B. GOETZ.
J. D. TAYLOR, *Notary Public.*

A true copy of the original:

NEW ORLEANS, October 14, 1886.

J. D. TAYLOR, *Notary Public.*